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HOWARD'S
PRACTICE REPORTS
IN THE
SUPREME COURT
AND
COURT OF APPEALS
OF THE
STATE OF NEW YORK.

By R. M. STOVER,
REPORTER.

VOLUME LIII.

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PRACTICE REPORTS.

SUPREME COURT.

WILLIAM A. COVERT agt. HERMAN HENNEBERGER.

Action between partners — demurrer to complaint.

In an action between partners, in order to justify a recovery in favor of the plaintiff for any "*specific sum*" there should have been a balance struck, or agreed upon, as due from the defendant to the plaintiff.

An action for such balance cannot be connected with an action for "*an accounting*," unless there be in the complaint appropriate allegations.

The court is justified in looking at the prayer for relief in order to ascertain the plaintiff's view of his own cause of action.

Special Term, October, 1876.

VAN VORST, J. — There are no allegations in the complaint sufficient to justify a judgment in favor of the plaintiff against the defendant for the sum demanded, or any sum whatever. The action being between partners, or late partners, in order to justify a recovery in favor of the plaintiff for any specific sum, there should have been a balance struck, or agreed upon, as due from the defendant to the plaintiff.

No such balance could have been reached without an adjustment, in some way, of the copartnership affairs. Such balance could doubtless have been agreed upon without the process of a formal accounting. But the complaint comes far short of such agreement between the parties.

The copartnership affairs have not been adjusted. Its property and liabilities must be ascertained and the affairs settled before it can be known how much of the firm assets and moneys, over and above his share thereof, the defendant has appropriated to his own use. Now this complaint is not constructed upon any basis which looks to a settlement of the copartnership affairs. But the plaintiff claims an absolute judgment in his favor for all copartnership moneys which the

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defendant has taken and appropriated to himself. It may be that, on an accounting, it will appear that he was entitled to a part of these moneys in any event. It is quite true that the allegations in the complaint go far toward sustaining an action for an accounting, but they do not reach nor are they plead to that end. In no view did the pleader have in mind an action to adjust the copartnership affairs so as to ascertain how the defendant stood to the firm and to the plaintiff, and his demand is for a judgment for a sum certain and an execution against the person of the defendant on account of a misappropriation of copartnership moneys.

It is true that no demurrer will lie simply to the prayer for relief, and that such judgment will, in the end, be given as the facts *under the pleading* will justify, or as they appear upon the trial. But the court is justified in looking at the prayer for relief in order to ascertain the plaintiff's view of his own cause of action.

In his complaint plaintiff does not aver his readiness himself to enter into an accounting concerning the partnership affairs, nor that such proceedings is at all within his contemplation. Such accounting nowhere appears as an objective point, and yet it is fundamental that such adjustment be had.

I think the plaintiff's complaint is defective, in substance, in its omission of all reference to an accounting, or any intimation that it is contemplated by this action. I do not now speak of the prayer for relief, but of the complaint itself. A defendant has a right to know by the allegations in the complaint what he is to meet on the trial, and it would be a liberal system indeed which would connect an action evidently based upon the idea of a right to recover a sum certain into an equitable action for an adjustment of copartnership affairs. I think the plaintiff should amend his complaint if he desires an accounting, as I do not think, in its present form, it sets forth a cause of action. There should be judgment for defendant on the demurrer, with leave to plaintiff to amend on payment of costs.

Walker agt. Donovan.

N. Y. COMMON PLEAS.

DANIEL WALKER agt. CHRISTIAN DONOVAN.

Supplementary proceedings — order for examination of defendant on application of personal representative of deceased judgment creditor.

The personal representatives of a deceased judgment creditor, in whose lifetime an execution was issued upon the judgment and returned unsatisfied, may, upon showing that fact, and giving proof that letters testamentary or of administration had been issued to them, have an order for the examination of the defendant in proceedings supplementary. It is not necessary in such a case, before the personal representative can proceed to enforce the judgment, that the action should be revived and continued in their name.

By the amendment of section 288 of the Code in 1866, it was provided that in case of the death of the person in whose favor the judgment was given, his personal representatives duly appointed might, at any time within five years after the entry of the judgment, enforce it by execution. Since this amendment, it is no longer necessary to bring an action on the judgment in the nature of a *scire facias* to have the executor or administrator made a party to the judgment to enable him to institute summary proceedings to reach the equitable assets of the debtor.

The affidavit upon which the order for the examination of the defendant is asked must set forth the judgment; that the party who applies for the order is the sole executor or administrator of the judgment creditor; that an execution was issued, and the date of it; that it was returned unsatisfied; that the judgment creditor is dead, and that letters testamentary or of administration were duly issued to him, and that he duly qualified and has ever since acted as his executor or administrator.

Any defense or answer which the judgment debtor has to the enforcement of the judgment, except matters which ought to have been pleaded to the original action, or which existed prior to the judgment, is available to him where an order is obtained for his examination in supplementary proceedings.

Special Term, April, 1877.

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DALY, C. J.—The enforcement of a judgment referred to in the two hundred and eighty-third section of the Code, is the enforcement of it by execution. That section allows it to be enforced by the party in whose favor it was rendered, or in case of his death by his personal representatives, at any time within five years after the entry of it; and by section 284 it may be enforced after five years, with the leave of the court, in the cases and in the manner therein provided. But if an execution upon it has been returned unsatisfied the judgment creditor is, "at any time after such return" (*sec.* 292), entitled to an order for the examination of the defendant, and the limitation of five years has no application to this equitable remedy, nor is there any limitation to it, except that which the statute has imposed in respect to equitable remedies generally (*Owen agt. Dupignac*, 9 *Abb. Pr.*, 184; *Miller agt. Rossman*, 15 *How. Pr.*, 10).

Under the Revised Statutes a creditor's bill might be filed within ten years, and all that was necessary to aver was the judgment, and that the plaintiff had exhausted his legal remedy by issuing and return of an execution unsatisfied (2 *R. S.*, 173, *sec.* 38; *McElvair agt. Willis*, 9 *Wend.*, 560).

If an execution had been returned unsatisfied the bill might be filed, although an execution had been subsequently issued which had not been returned, and though a levy had been made under that execution, unless it appeared that the property levied upon was amply sufficient to pay the judgment (*Culver agt. Moreland*, 6 *Paige*, 273; *Bates agt. Lyons*, 7 *id.*, 85; *Thomas agt. McEwen*, 11 *id.*, 131). Vice-chancellor WHITTLESEY, in *Storms agt. Reynolds* (*Clark's Ch. Rep.*, 148) undertook to limit the right to this equitable remedy by holding that after a judgment had stood for a period of three years or more the plaintiff should try again with an execution to collect before asking the aid of a court of equity; but this doctrine was repudiated by chancellor WALWORTH, in *Corning agt. Stevens* (1 *Barb. Ch.*, 589), who held that there was no limitation of the time within which

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to file a creditor's bill short of the ten years which the statute had fixed as the time within which suits of equitable cognizance must be brought.

The question presented in the present case is, whether the personal representatives of a deceased judgment creditor, in whose lifetime an execution was issued upon the judgment and returned unsatisfied, may, upon showing that fact and giving proof that letters testamentary or of administration had been issued to them, have an order for the examination of the defendant in proceedings supplementary.

It is insisted that before the personal representatives in such a case can proceed to enforce the judgment it must be revived and continued in their name.

As the law stood before the amendment, in 1866, of section 283 of the Code, if the plaintiff died after judgment and before the issuing of an execution the personal representatives could not issue execution; but to enable them to do so they had to bring a writ of *scire facias*, and after the Code, the Code having abolished that writ, an action in continuation of the judgment that they might be made parties to it and have the right to enforce it by execution, the rule being, in the language of lord HOLT in *Penoyer agt. Brace* (1 *Ld. Raym.*, 241; 1 *Salk.*, 320), "that when any new person is either to be better or worse by execution there must be a *scire facias* to make him a party to the judgment because he is a stranger, as in the case of an executor or administrator" (*Earl agt. Brown*, 1 *Wils.*, 302; 2 *Co. Inst.*, 471; *Bacon's Abr.*, 112 [5th *Lond. ed.*]; *Cameron agt. Young*, 6 *How.*, 372; *Alden agt. Clark*, 11 *id.*, 209; *Thurston agt. King*, 1 *Abb. Pr.*, 126; *Wright agt. Nutt*, 1 *T. R.*, 388; *Bellenger agt. Ford*, 21 *Barb.*, 311). Though if an execution, either against the goods or the body, had been issued during the plaintiff's lifetime it could be executed after his death and no *scire facias* was necessary (*Clark agt. Withers*, 6 *Mod.*, 290, 2 *Ld. Raym.*, 1072; 1 *Salk.*, 322; *Ellis agt. Suffitt*, 16 *M. & W.*, 105; 1 *Wms. on Executors*, 760 to 769).

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But the amendment of section 283, in 1866, made a material change in the law in this respect by providing, that in case of the death of the person in whose favor the judgment was given his personal representatives duly appointed might, at any time within five years after the entry of the judgment, enforce it by execution. This was giving the personal representatives the same right to sue out execution which the judgment creditor would have had in his lifetime; and after the passage of this amendment it is no longer necessary to bring an action on the judgment, in the nature of a *scire facias*, to have the executor or administrator made a party to the judgment.

If the executor or administrator may sue out an execution, as the judgment creditor might have done in his lifetime, there is certainly no reason why the executor or administrator should institute an action in the nature of a *scire facias* to enable him to bring a creditor's bill or to institute summary proceedings to reach the equitable assets of the debtor. It was not because the judgment had abated that the executor or administrator had to sue out a writ of *scire facias* before he could enforce it by execution, but because he was a stranger to the judgment, and there had to be a preliminary inquiry as to his right before he could enforce it. An alteration of the parties, as was said in *Penoyer agt. Brace (supra)*, "altereth the process," and the executor or administrator had to have himself made a party to the judgment before he could have execution, and that could only be done by suing out a writ of *scire facias*. The writ of *scire facias*, in judgments in personal actions, came into use because, if no execution was issued upon such a judgment within a year, the presumption was that the judgment had been satisfied, or for some supervening cause ought not to be allowed to have its effect, and, therefore, after a year, there was no way to give effect to it, except by bringing another action upon it, and the *scire facias* was adopted as a less expensive and dilatory course for the plaintiff, and as affording full protection to the judg-

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ment debtor, if there was any reason why the judgment should not be enforced by execution (*Hiscocks* agt. *Kemp*, 2 *Ad. & E.*, 679; *S. C.*, 5 *N. & M.*, 113; *Foster on Scire Facias*, 6, 7).

Where a creditor's bill was brought, and it appeared that the judgment creditor could not stir at law without a *scire facias*, the court would allow him to sue out his writ of *scire facias*, meanwhile retaining the bill (*Coysgarne* agt. *Fly*, 2 *Wm. Bl.*, 995; *Roe* agt. *Bent*, 1 *Dick.*, 150; *Burroughs* agt. *Elton*, 11 *Ves.*, 35).

But the whole of this proceeding has been swept away by the Code, which allows the judgment creditor, or, after his death, his personal representatives, at any time within five years — and after five years with the leave of the court — to enforce the judgment by execution. The execution issues in the name of the personal representative, and if there be any reason why the judgment should not be enforced by execution, the judgment debtor must, as he would have to do where the judgment creditor issued one, move the court to stay it or set it aside. Even before the Code, a stranger to the record, an assignee of the judgment, might file a creditor's bill without having himself made a party to the judgment and suing out execution. In *Wakeman* agt. *Russell* (1 *Elw. Ch.*, 509), and *Fitch* agt. *Baldwin* (1 *Clarke*, 106), it was held that an assignee could not file a creditor's bill until he had himself taken out execution; but *Gleason* agt. *Gage* (7 *Paige*, 112), and in *Stranger* agt. *Langley* (3 *Barb.*, 650), the chancellor overruled both these decisions, and held that it was sufficient that an execution had been issued and returned unsatisfied, and that an assignee afterwards was entitled to file a creditor's bill without the issuing of an execution on his part.

But even if there should be doubt as to the effect of the amendment of the two hundred and eighty-third section, giving the personal representatives of the judgment creditor the same right to issue execution which he had in his lifetime, the judgment debtor has preserved to him, upon the filing of a creditor's bill or in supplementary proceedings, all that he

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had upon a writ of *scire facias*; for every thing that could arise upon a *scire facias*, whether it relates to the representative character of the executor or administrator, or the rights of the judgment debtor, is attainable in the equitable procedure, whether it is in the form of a creditor's bill, which, it has been held, has not been abolished, or, in the supplementary proceedings, which is a summary and efficacious substitute for it.

All that it was necessary to state in the *scire facias*, in addition to the judgment, was the death of the plaintiff, and that the person suing out the writ was his executor or administrator, duly appointed; and it was then for the defendant to show why execution should not issue to enforce the payment of the judgment (2 *Tidd's Pr.*, 1119 [9th *Lond. ed.*]; *Murphy* agt. *Cochran*, 1 *Hill*, 342).

When an executor or an administrator brings a creditor's bill upon such a judgment, or obtains an order for the examination of a judgment debtor in supplementary proceeding, both the court and the judgment debtor are informed by the complaint in the one case, and by the affidavit in the other, of all that was necessary to set forth, upon a *scire facias*, to entitle an executor to issue execution as well as all that it is requisite to state in a creditor's bill to reach equitable assets. The fact of the judgment, the issuing and return of an execution unsatisfied, the death of the plaintiff in the judgment and the granting of letters testamentary or of administration to the personal representative who bring the creditor's bill or institute the supplementary proceeding, and any defense or answer which the judgment debtor has to the enforcement of the judgment, except matters which ought to have been pleaded to the original action or which existed prior to the judgment (*McFarland* agt. *Irwin*, 8 *Johns.*, 77), is available to him whether he is summoned to answer a creditor's bill or to be examined upon proceedings supplementary.

The affidavit upon which the order for the examination of the defendant was granted sets forth the judgment that Mary Walker, who applies for the order, is the sole executrix of

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the judgment creditor; that an execution was issued on the 14th day of October, 1867, and returned unsatisfied; that the judgment creditor died on the 9th day of August, 1870, and that letters testamentary were duly issued to her as his sole executrix named in his will; that she duly qualified and has ever since acted as his executrix.

The *scire facias* was always regarded simply as a continuation of the original action and judgment, and the supplementary proceedings are, in this respect, the same. The legal remedy having been exhausted they give to the creditor in the court where the judgment was rendered, or in the county to which the execution was issued, substantially all the aid for the discovery and application of the equitable assets of the debtor that was attainable before only by a creditor's bill, and any defense which the debtor might have made to such a bill or to the enforcement of the judgment is available to him in this proceeding. He is served with an order and a copy of the affidavit upon which it was made containing the facts which entitle the party instituting the proceedings to require him to make discovery concerning his property. When he is brought before the judge he may set up any defense that he has to the proceeding, or if required in the first instance to appear before a referee, he may, upon an affidavit disclosing the grounds, obtain an order for the party who instituted the proceedings to show cause why they should not be dismissed. In fact all that is or could be available to a judgment debtor in an action in the nature of a *scire facias* is available to him in this proceeding, and there is no reason why, in such case, the executor should be required to institute an action, in the nature of a *scire facias*, before he can obtain an order requiring the judgment debtor to make discovery concerning his property.

The motion to dismiss this proceeding will, therefore, be denied, and the defendant will be required to appear before the referee and be examined upon a day to be inserted in the order denying the motion.

Noyes agt. Children's Aid Society.

SUPREME COURT.

MARY E. NOYES and JAMES LOVERIDGE, executors, etc., appellants, agt. THE CHILDREN'S AID SOCIETY OF THE CITY OF NEW YORK and others, respondents.

Power of surrogate of New York as to costs in cases contested before him.

The surrogate of New York has no power, under the act of 1870 (*Laws of 1870, section 9, chapter 359*), to make allowances to parties who do not prevail in cases contested before him.

He may excuse such parties, if the case be in his judgment a proper one, from the payment of costs personally, but he cannot take the subject-matter of the contest, which he adjudges to belong to the successful party, and distribute it, or any part of it, among his defeated antagonists.

General Term, First Department, January, 1877.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order of the surrogate of the city and county of New York, making allowance to the counsel of respondents, etc.

R. W. De Forest, for appellants.

D. R. Jaques and H. L. Clinton, for respondents.

DAVIS, P. J. — The respondents were unsuccessful contestants of the will of Eliza Hearsey, of which the appellants were proponents. They claimed under a prior will of the testatrix, in which they were made residuary legatees. After making a decree, admitting to probate the will propounded

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by the appellants, which revoked the former will, the surrogate made an order under section 9 of chapter 359 of the Laws of 1870, granting an allowance and disbursements to the counsel of the prevailing party; and granting an allowance and disbursements to the counsel of the Children's Aid Society, and an allowance to the counsel of St. Luke's Home, which corporations were the defeated contestants. The principal question upon this appeal is whether the surrogate had power to grant allowances to the counsel of the contestants. Previous to the Revised Statutes, surrogates had no power to award costs in any case (*Schultz agt. Pulver*, 3 Paige, 188; *S. C.*, 11 Wend., 363; *Reid agt. Vanderheyden*, 5 Cow., 719; *Devin agt. Patchin*, 26 N. Y., 441, 449).

The Revised Statutes provided as follows: "The surrogate may award costs to the party in his judgment entitled thereto, to be paid either by the other party personally, or out of the estate which shall be the subject of the controversy" (2 R. S., 223, section 10; 3 R. S. (5th ed.), 367, section 25).

This provision was not affected by the Code (*Devin agt. Patchin*, 26 N. Y., 441), so that prior to the act of 1870, only taxable costs could be awarded, and the surrogate had no power to make any allowances, either to a party as additional costs or the counsel as counsel fees (*Reed agt. Reed*, 52 New York, 651; *Burtis agt. Dodge*, 1 Barb. Ch., 77; *Devin agt. Patchin*, *ubi sup.*; *Lee agt. Lee*, 39 Barb., 172; *Western agt. Romaine*, 1 Brad., 37; *Wilcox, agt. Smith*, 26 Barb., 316).

In *Lee agt. Lee* (39 Barb., 172; *S. C.*, 16 Abb. R., 129) it was held by the general term of the first district, that the Revised Statutes only permitted the surrogate to award costs to the successful party or parties, and that he could not give costs out of the estate to defeated contestants.

And this construction accords with the language of the statute which empowers him "to award costs to *the party* in his judgment entitled thereto,"—not to both or all parties—

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"to be paid by *the other party* personally, or out of the estate which shall be the subject of the controversy."

This statute conferred power to adjudge of three things: First, whether costs should be awarded; second, the party entitled thereto by reason of success in the controversy; and third, whether they should be charged personally on the other party, or be paid out of the subject in controversy. This was the condition of the law when the enactment of 1870 was made. That act declared that "the surrogate of said county (New York) may grant allowances in lieu of costs, to counsel in any proceeding before him in the same manner as are now prescribed by the Code of Procedure" (*Section 9, chapter 359, Laws of 1870, p., 828*). This section has, in practice, been construed in the broadest and most sweeping sense; and such construction has literally reversed what was said in one of the opinions of the court of appeals (*Devin agt. Patchin, 26 N. Y., 449*), to wit, that "surrogates cannot lawfully act as almoners of the estates of deceased persons."

The construction of this section seems never to have been presented to an appellate tribunal, but the reason of this fact (if it be one) may perhaps be found in another portion of the opinion just quoted from.

We think the key to the true construction may be found in the plain letter of the act. The power given to the surrogate is to "grant allowances in lieu of costs." He may still award costs, if he decide to do so, or in lieu of them he may grant allowances. This language very clearly restricts the allowances he may make to the cases in which he may award costs, because he is only empowered to put the allowance in the place of costs.

Hence, in cases where he cannot in his discretion give costs, he cannot in his discretion grant an allowance. We have already seen that he can only award costs to a successful party, and that his discretion beyond that lies in determining whether he will charge the other party personally with the costs, or direct their payment out of the fund. The power

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conferred by the section is, therefore, no broader in its operation than that given by the Revised Statutes in respect of costs; and is simply an authority to substitute allowances, in lieu of costs, in cases where the surrogate can lawfully award costs.

Nor do we think the force of this construction is at all diminished by the fact, that the word "allowances," is in the plural. It is obvious that there may be in such litigations several successful persons to whom costs may be awarded, and the form of expression more properly refers to those cases than to everybody who may happen to be on either side in such a controversy, whether losing or winning. Nor does the reference to the Code seem to us to enlarge the power of the surrogate. He "may grant allowances in lieu of costs to counsel in the same manner as are prescribed by the Code of Procedure in civil actions."

This is merely saying that his mode of proceeding in granting the allowance, shall be restricted by the provisions of the Code in respect to the character of the case, as to its being difficult and extraordinary, or one in which a trial has been had, and in respect to "the subject-matter involved" or "the amount of the recovery or claim," and the limitation imposed thereby upon the extent of the allowance.

These things are regulated by section 309 of the Code. That section provides for allowances in addition to costs; the section relating to surrogate courts provides only for allowances in lieu of costs; but it is apparent that under either of them no allowance is to be given unless the case and the party be one to whom costs are, or may be awarded. That part of section 300, which provides for actions or proceedings for the partition of real estate, may be eliminated in considering this question. The residue of the section will then read thus: "In difficult and extraordinary cases, where a defense has been interposed, or in such cases where a trial has been had * * * the court may also, in its discretion, make a further allowance to any party, not exceeding five per

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cent upon the amount of the recovery or claim, or subject-matter involved." The party to whom this further allowance may be made, must be a successful one, at least in respect of costs, or the allowance will not be further.

To ascertain the significance of the word "further" we must look at the several preceding sections of the Code, from which we find that costs are allowed only to "the prevailing party" who is to be ascertained as prescribed by such sections, and it is to him, when so ascertained that the further allowance can be made.

And so if we import the words "to any party" into the surrogate's section in place of the words "to counsel" we gain nothing, because in either case the allowance must be either a "further" one, which is in addition to costs given, or one "in lieu of costs," which implies that costs can be, or may have been given. We think, therefore, that the surrogate has no power, under the act of 1870, to make allowances to parties who do not "prevail" in cases contested before him.

He may excuse such parties, if the case be in his judgment a proper one, from the payment of costs personally, but he cannot take the subject-matter of the contest which he adjudges to belong to the successful party, and distribute it, or any part of it among his defeated antagonists. A construction which permits that to be done is hostile to the spirit of our laws, which in cases of established testacy, requires estates to be divided according to the will of the testator, and in cases of intestacy, according to the statute of distributions.

It is also against public policy, for it virtually offers a premium to reckless contestants and their counsel to prevent the settlement of estates, by promoting litigation and engendering strife, when every interest of the public calls for their speedy adjustment. The intention of the statute was to enable the surrogate, by making reasonable allowances, to compensate executors and administrators, or other prevailing parties, for expenses which might exceed the items and taxable

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cost ; and not to allow him, *ad libitum*, to reward the unsuccessful clamor of defeated litigants. The other construction might lead to great abuses, to the injury of the widows and orphans, and the creditors of deceased persons, whom all courts should be sedulous to protect. It would be a hazardous experiment for a wealthy man to attempt to dispose of his estate by his own will, if it could be distributed at the mere will of the surrogate, amongst the counsel of all who choose to set up whatever pretexts of contest the ingenuity of avarice can devise. We do not mean by these suggestions, to indicate that the will in this case was improperly contested ; but on the contrary, we think the contestants had probable cause to resist the probate of the will propounded, and that their contest was in all respects fairly conducted, and for that reason we have excused them from costs on all the appeals. But we fail to see any reason in law or justice for awarding them out of the estate several thousand dollars, *pro falso clamore*.

Without considering the several other questions presented by the appeal, some of which are fatal to a large portion of the allowance, we think it our duty to reverse the parts of the order appealed from, but without costs.

BRADY and DANIELS, JJ., concur.

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SUPREME COURT.

In the matter of the ATTORNEY-GENERAL agt. THE CONTINENTAL LIFE INSURANCE COMPANY.

Life insurance companies — mode of dissolution — application of attorney-general.

The proceeding authorized by the statute of 1853 (*Laws of 1853, chap. 463, section 17*) which makes it the duty of the attorney-general (upon the report of the superintendent of the insurance department that the assets of any life insurance company are insufficient to reinsure the outstanding risks) to apply to the supreme court to decree a dissolution of such company, and a distribution of its effects, including the securities in the hands of the comptroller, is *exclusive*, and is *now* the only mode of dissolution of a life insurance company.

A stockholder or a creditor of a life insurance company cannot *now* bring an action, under the Revised Statutes, in behalf of himself and all other stockholders for the dissolution of such company, and the distribution of its assets, as such proceeding is *superseded* by the act of 1853.

Ulster Special Term, March, 1877.

APPLICATION by the attorney-general, pursuant to section 17 of chapter 463 of the Laws of 1853, against "The Continental Life Insurance Company" to "decree a dissolution of said company and a distribution of its effects, including the securities deposited in the hands of the comptroller."

Mr. Charles S. Fairchild, attorney-general, in person.

Mr. William Barnes, for sundry policyholders.

Mr. J. Henry Work, for sundry other policyholders.

Mr. John L. Hill, opposed to application and representing Mr. Andrews and others.

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Mr. W. Britton, appears informally to make a statement in behalf of Mr. Grace, who was appointed receiver in an action brought in this court by John O. Hoyt, a stockholder in the company, in behalf of himself and all others stockholders, to annul and dissolve the corporation and to distribute its assets.

WESTBROOK, J. — The present application to dissolve "The Continental Life Insurance Company" and to distribute its effects is made by the attorney-general, and is based upon section 17 of chapter 463 of Laws of 1853, entitled "An act to provide for the incorporation of life and health insurance companies, and in relation to agencies of such companies." When the matter was originally presented to the court objection to action upon it was made upon the same ground now urged, that in an action brought in this court by John O. Hoyt, a stockholder of the corporation, in behalf of himself and all other stockholders, a judgment had been rendered dissolving the company, ordering its assets to be distributed, and appointing a receiver for that purpose; and that as the company was by such judgment already dissolved, and its assets in the hands of a receiver, no further action under the present proceeding could be had. Notwithstanding such objection this court, at special term, Mr. justice OSBORN presiding, on the 8th day of November, 1876, appointed a referee "to take the proof touching said application * * * and to report such proof with all convenient speed." On appeal to the general term of this court in the third department this order of the special term was affirmed, and an appeal from such order of affirmance to the court of appeals was dismissed because it was not appealable. The referee has made his examination and presented his report, and the attorney-general now moves that the (to use the exact language of section 17 of the statute of 1853) "court shall decree a dissolution of said company and a distribution of its effects, including the securities deposited in the hands of the comptroller."

In opposition to this motion it is not claimed that sufficient

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cause under the act of 1853 has not been shown or does not exist, but the point made at the previous special term is repeated, and thus this question, and the only one, is squarely presented: Is the proceeding authorized by the statute under which the attorney-general proceeds (*chapter 463, Laws of 1853*) exclusive, or can a stockholder or a creditor of a life insurance company also proceed under the Revised Statutes (2 *Edmonds' Statutes*, page 484, sec. 389, &c.)? The question is a grave one and its right determination is of great importance, not only to the people of this state but to those of other states as well who are also largely interested as policyholders and otherwise in corporations created and controlled by our laws.

When the Revised Statutes under which the proceedings claimed to be a bar were instituted life insurance companies were not in existence in this state. The first act authorizing their formation is chapter 308 of the Laws of 1849, and this was followed by chapter 95 of the Laws of 1851. As from time to time such companies were formed and their business increased, reaching into every part of the entire nation, it became apparent that further legislation specially adapted to them, and placing them more completely under the control of state officials, should be had. This need the act of 1853 undertook to supply. By its seventeenth section the superintendent of the insurance department is directed to examine into the affairs of any company (*see, also, sec. 8 of chapter 708 of the Laws of 1867, and sec. 15 of chapter 902 of the Laws of 1869*) whenever he shall suspect it of unsoundness, the section clothing him with full authority so to do, and if from such examination it shall appear to the superintendent "that the assets of any such company be insufficient to reinsure the outstanding risks, he shall communicate the fact to the attorney-general, whose duty it shall then become to apply to the supreme court for an order requiring them to show cause why the business of such company should not be closed, and the court shall, thereupon, proceed to hear the allegations

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and proofs of the respective parties; and in case it shall appear to the satisfaction of the said court that the assets and funds of the said company are not sufficient, as aforesaid, the said court shall decree a dissolution of said company and a distribution of its effects, including the securities deposited in the hands of the said superintendent. The supreme court shall have power to refer the application of the attorney-general to a referee to inquire into and report upon the facts stated therein."

It is obvious, from the language of this section, that a plan for the protection of all parties interested in a life insurance company based upon the ascertainment of the condition of its affairs by a state officer whose duty it is to examine therein, has been devised, a standard by which its right to exist and continue has been declared and full provisions for its extinction and the distribution of its assets made. Are these provisions exclusive? Whilst it is true that the repeal of a statute by implication is not favored in law it would seem that the passage of a statute specially applicable to life insurance companies must supersede other and older ones passed before any such companies existed. Perhaps, however, it would be more accurate to say that a general law regulating the formation, the practical working and dissolution of such corporations — purporting to provide for them a complete system — should be deemed the only one applicable to such corporations, and that older statutes framed for other kinds of corporations should not apply, unless specially declared to be so applicable in the new act (*Excelsior Petroleum Co. agt. Lacey et al.*, 63 *N. Y. Rep.*, 422). This principle was evidently present to the legislative mind which framed the act of 1853. By its eleventh section portions of the old statutes are declared to be applicable to life insurance companies, and other parts are expressly said to be inapplicable. That section provides that they "shall be subject to all the provisions of the Revised Statutes in relation to corporations so far as the same are applicable, except in regard to annual statements and

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other matters herein *otherwise* specially provided for." The change made in the phraseology of this section from that of section 17 in the act of 1849, and which was the first act in regard to life insurance companies passed in this state, is worthy of notice. That section made them "subject to *all* the provisions of the Revised Statutes in regard to corporations, so far as the same are applicable." But the statute of 1853, by plain and direct words, expressly excepts from the operation of the Revised Statutes those parts thereof "in regard to annual statements," and also the "other matters" which are therein "otherwise specially provided for." Why was this addition made in the act of 1853? Up to that time, at least, all provisions of the Revised Statutes not inapplicable were declared to be applicable, and to that period, such an action as that brought by Mr. Hoyt could have been maintained, for the Revised Statutes did provide for proceedings by "the attorney-general, in behalf of this state," not only, but also for those by "any creditor or stockholder" of a corporation therein enumerated, in case of its insolvency or inability to pay its debts, to enjoin its further continuance in active life and to distribute its assets (2 *Edmond's Statutes*, 484, *secs.* 39, 40, &c.). If those proceedings could go so far as to declare the corporation dissolved, and the parties resisting this application must so claim to uphold their judgment, which is one of actual dissolution, then it follows that the Revised Statutes provided machinery for the dissolution of a corporation, which was open alike to the attorney-general, the creditor or the stockholder, and which either could employ under the act of 1849. The statute of 1853 is, however, subsequently passed and provides a new and different mode of dissolution, unknown to the prior statutes. It can only be by the application of the attorney-general, based upon the action of the superintendent of the insurance department. Instead of the door being left open to every creditor or stockholder to bring suit, with whom so to do the attorney-general had before only equal rights, the state has devised a plan by which its own officers,

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who are always presumed to act for the best interests of all interested, shall guard the rights of the corporation, the creditor and the stockholder. If the Revised Statutes, then, did provide for the dissolution of a life insurance company, has not the act of 1853 also given a way to the same result, which is "otherwise?" And if it is "otherwise," has not the act of 1853 expressly declared that the old remedies are inapplicable?

It is, it seems to me, no answer to the argument just made, to say that because the act of 1853 makes no provision for actions by creditors or stockholder to distribute its assets, that, therefore, the right to bring such suits is not taken away, and that the remedies therein given are cumulative and not exclusive. The more logical conclusion from such a premise is its precise reverse, because it gives no proper force to the fact that the dissolution of the corporation, and the distribution of its assets, are specially and completely provided for by the act of 1853, and that those provisions are "otherwise" than those of the Revised Statutes. The results to be reached by both acts are the same; the extinction of the corporate life, and the administration upon and settlement of the estate. If, by the terms of one, several parties may alike initiate proceedings to that end, and, by the other, only one may take such action, and that for broader reasons than those before allowed, and yet embracing them, it is idle to argue that the dissolution of a corporation, and a full liquidation of its estate, has not, by the new way, been fully provided for, which must of necessity be one which is "otherwise," *i. e.*, different from the old. The omission from the new statute of the right of action by stockholder or creditor to wind up the corporation, and the conferring of that power upon the attorney-general alone, who acts only upon the information of the officer who is specially charged by law with the duty of watchful care over the corporation for the interest of all, and the substitution of a new test, by which the right of the company to exist is determined, instead of furnishing evi-

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dence of the cumulative character of the new remedial provisions, are, when coupled with the positive declaration of section 11 thereof, that where such new act is "otherwise," that is, changed from the old, the latter does not apply, not only controlling and convincing to show that the old remedies no longer exist, but also a positive averment of the entire abrogation thereof.

Neither does this construction do any injustice to a creditor or a stockholder. All rights and remedies necessary to protect himself alone, by action, are left open. His power to wind it up, in which many others besides himself are interested, is only taken away. When, however, public policy and the interests of all as well as his demand its death, the officers of the state alone can take its life and administer its assets. That this policy is better, wiser and safer for all is most manifest. It is not to be assumed that sworn officials will fail in duty, or if they do, they can still by the action of the aggrieved stockholder or creditor, be compelled to act. Rights of stockholders and creditors who have no knowledge thereof should not be jeopardized by suits instituted by any stockholder under the Revised Statutes, and so brought for a fraudulent and wrecking purpose by collusion with the officers of the corporation, which rights can surely be imperiled if the remedies given by the Revised Statutes still exist. The temptation so to do was too great to make every stockholder and every creditor the depository of so great a power for mischief, and hence, it seems to me that the act of 1853 wisely provided a new method of extinction and administration by which the power which gave the life, is alone empowered to take it. When action looking to the death of the corporation becomes necessary the officials of the state will and must intervene. Until they see good cause so to do, or until the court can see good cause to compel their action, if they refuse, such remedies should not be invoked. No interest of any person nor of the general public demands it.

Since the argument of this motion, my attention has been

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called to a decision made by Mr. justice PRATT, in which he has come to a conclusion which is the reverse of what has been herein enunciated. Sincere respect for my learned judicial brother has caused me to read his opinion with care, and it would be followed if my own convictions were not entirely clear. It seems to me that the object of the act of 1853, taking its plain language as the best evidence of the legislative intent which dictated it, was, among other things, to declare the only mode of the dissolution of a life insurance company through the courts; that by its provisions neither creditor nor stockholder is left unprotected, and that the state as guardian of all parties and interests, has, by such statute, expressly reserved to itself all power to act. These propositions it has been attempted in the former part of this opinion to make manifest, and if such attempt has failed, a repetition of the arguments will not add to their strength. A higher tribunal will decide honest difference of opinion, arising between inferior courts, and the method of reaching a right result in the court of dernier resort is for judges in the lower ones to give to it the aid of their judgment and of their views. It is proper to state, however, that the conclusion of judge PRATT differs from that of judge HARDIN, in *Fisher agt. The World Mutual Life Insurance Company* (47 *Howard Prac. Rep.*, 451), as well as from my own, the latter judge having, in an able opinion, reached the same result with myself upon the effect of the act of 1853.

Before closing this opinion allusion should be made to the order of the Brooklyn special term of February 20, 1877, by which the court upon an order to show cause granted on the day previous, decrees the superintendent of the insurance department, the attorney-general and the people, to be bound by the judgment rendered in the case of Hoyt, to which judgment allusion has been heretofore made, and directs the proceedings upon this application to be made ancillary to such judgment, and declares anew "that the said Continental Life Insurance Company is wholly dissolved and its fran-

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chises extinguished." If the original judgment was unwarranted and unauthorized, as has been endeavored to be shown, it is difficult to see how any person other than the parties to it, can be bound by it, and how those, who were not such in the original action, and who have had no opportunity to make defense, can, on mere motion, be so brought into court as to give it jurisdiction thus summarily to conclude their rights. And when a plain statute guides and prescribes official action, it is impossible for us to see how any court can, in another action to which state officers and its people were not parties, and on the merits of which they have never been heard, change and alter such statute, and make a proceeding under it a mere tender in aid of another proceeding founded upon other statutes and instituted by other parties. The order which seeks to accomplish such objects was, it seems to me, clearly unadvised and unwarranted in law.

It follows from the views expressed that the motion of the attorney-general is granted. The order will be settled on a day to be fixed by the court, when the parties interested will be heard as to the proper person to be receiver and whose name must be inserted in the order.

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N. Y. COMMON PLEAS.

WILLIAM N. RAE agt. HENRY HARTEAU and WILLIAM N.
BEACH.*Appeal — Undertaking — when action against sureties may be commenced.*

To entitle a plaintiff to maintain an action against the sureties on an undertaking given in pursuance of section 348 of the Code for the purposes of an appeal, notice of entry of the order or judgment affirming the judgment appealed from must be served upon the adverse party ten days before the commencement of the action.

The commencement of the action before the lapse of ten days after notice, is fatal to the recovery.

This notice, like all other notices required by the Code, must be given in writing, and must be so explicit as plainly to give the information required by the statute.

The decision upon an appeal taken by the principal can, in no way, be effectually decided or disposed of by an "order," but only by a judgment of affirmance duly perfected.

An order is but a decision upon a motion, and is expressly distinguished from a judgment which is defined as the final determination of the rights of the parties. A judgment is to be entered in the judgment book and perfected by the filing of a judgment roll from which the right of appeal from a judgment would begin to run.

Notice of the judgment *so perfected* is the notice required by the statute (*Code, sec. 348*) to be served on the adverse party *ten days* before the commencement of the action on the undertaking.

*General Term, January, 1877.**Edwin T. Rice, for plaintiff.**B. F. Lee and Lewis Beach, for defendants.*

ROBINSON, J. — A judgment was recovered by plaintiff in the city court of Brooklyn against Lewis Beach on the 2d

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day of October, 1872, for \$527.96, which, on an appeal to the general term of that court, was affirmed by judgment finally entered on the 15th day of May, 1875, with \$131.66 costs of affirmance.

These defendants became sureties in an undertaking given for the purposes of that appeal.

The decision on such appeal appears, by an order to that effect dated April 28, 1875, incorporated in the judgment roll and signed with the initials "G. G. R.," presumably those of judge REYNOLDS of that court, and also with the initials "G. W. K.," presumably those of George W. Knaebel, its clerk, but the costs were not taxed nor was the judgment perfected until the 15th of May, 1875.

The undertaking contained the provisions required by sections 354, 355 and 356 of the Code relating to appeals to a county court from justices of the peace, or to this court from judgments of district courts, instead of such as were required on appeals from such a judgment to the general term of the city court of Brooklyn by section 6 of chapter 470 of the Laws of 1870, assimilating such an appeal in all respects to that provided for in sections 348, 349 and 350, chapter 4, title 2 of the Code, wherein provision is made for a stay of proceedings upon the order or judgment appealed from in the manner provided for by sections 334 and 335.

The complaint alleges the entry of an order of affirmance of the judgment appealed from on the 28th day of April, 1875, and the service of a copy thereof on the twenty-ninth; also the issuing and return of executions upon the original judgment and that rendered on the appeal for costs wholly unsatisfied.

The answer of the defendants, so far as material to the question now passed upon, admitted the filing in the office of the clerk of the city court of Brooklyn by plaintiff's attorney of certain papers claimed to be a judgment in the original action on October 2, 1872, for \$527.96, and also papers claimed to be a judgment against the appellant Lewis Beach

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for costs of said appeal for the sum of \$131.96 on the 15th day of May, 1875, but denied all other allegations in respect to said judgments.

The present action was commenced in July, 1876. The question that first presents itself on this appeal is as to the right of the plaintiff to maintain the action for want of service of any written notice of the entry of judgment of affirmance that was perfected on the 15th of May, 1875. In my opinion the objection to any recovery is, on this ground, fatal to plaintiff's claim. On the trial the only notice which the plaintiff proved to have been served on his behalf was a paper purporting to be a copy of the order signed by judge REYNOLDS and the clerk with their initials, before mentioned, but without any copy of said initials, or any indication that any such order had been previously signed, or any notice of its having been entered with the clerk of the court. The requirement of the entry of an order made upon any decision of a judge or court before any effect can be given to it is, under our system, a matter of substantial significance, and where granted by a judge in any judicial district must be entered with the clerk of the county in which the trial is to be had or the judgment to be filed. And in this respect the final entry of an order upon the decision of a judge or court, however otherwise formal, becomes a matter of materiality.

It was to such an "entry" of an order of affirmance that the three hundred and forty-eighth section of the Code has reference. Although in such a local court as that of the city court of Brooklyn much of the reason for the distinction in reference to the decision of the judges and the entry of orders thereon may not exist, the intention of the statute is yet clearly expressed and must have such construction as entitles it to a general application to all the courts of this state to which a common mode of entry of orders of affirmance is prescribed, with a view to the various purposes in respect to which such a perfected order becomes in any respect material.

If the present case depended alone upon the force and

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effect of the decision and its entry as an order, a presumption might possibly be indulged that the clerk entered the order immediately after the decision was made. The notices required by the Code are always such as must be given in writing (*sec.* 408), and must be so explicit as plainly to give the information required by the statute. The paper served in this case of what was or was to be, in terms, an order of the general term was without any indication of signature of judge or clerk, and with a mere indorsement (*Ex. H.*, p. 26) of the title of the cause, followed by these words: "Copy order affirming judgment. To Diefendorf & Beach, attorneys for appellant. Brainerd & Rice, attorneys for respondent." It conveyed no proper intimation that any such order had been entered with the clerk of the court. But, notwithstanding such a written decision of the general term may have been entered with the clerk, it did not become a judgment of affirmance, and no such judgment had been perfected so as to become the subject of further appeal as contemplated by the provisions of the Code, above referred to, at the time of serving such paper styled "copy order."

The amendment to section 348 of the Code by the act of 1862, while providing that no action should be commenced upon any undertaking given in pursuance of the provisions of that section, until ten days after the service of notice of the entry of the order or judgment affirming the judgment appealed from, had in contemplation, in addition to mere judgments appealed from, such orders as affirmed by the general term, in respect to which further appeals might be taken to the court of appeals, but also such orders or affirmance of orders appealed from in respect to which security had been given on the appeal to effect a stay of proceedings thereon, pursuant to the provisions of sections 334 to 339 of the Code (*Staring agt. Jones*, 13 *How.*, 423; *Smith agt. Hermans*, 18 *id.*, 261; *Niles agt. Battershall*, 26 *How.*, 93).

The three hundred and forty-ninth section, giving such right of an appeal from orders, provides they may be taken

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"in like manner and with like effect" as from judgments, as allowed by section 348.

The manifest intention of the amendment of 1862, above referred to, passed after the other provisions of section 348 and 349 had gone into effect, and allowing appeals in common from judgments and orders "in like manner and with like effect," must be taken distributively, as requiring the notice of ten days to be given before suit brought on the undertaking in case of the affirmance of an order, as well as upon the affirmance of a judgment.

The object of the notice in either case is to enable the principal debtor to protect his sureties, either by a further appeal to the court of appeals or to provide for payment before suit brought on the undertaking, or to afford time to take some measure for their relief.

The decision upon the appeal taken by Beach, the principal, could in no way be effectually decided or disposed of by an "order," but only by a judgment of affirmance duly perfected.

An order is but a decision upon a motion, and is expressly distinguished from a judgment (*Code, sec. 400*), which is defined (*Code, sec. 245*) as the final determination of the rights of the parties. A judgment is to be entered in the judgment book and perfected by the filing of a judgment roll (*secs. 280 and 281*), from which the right of appeal from a judgment would begin to run (*Sec. 331*).

No notice of the judgment so perfected on May 15, 1875, in the appeal in question, was ever served. The requirements of the statute (*Code, sec. 348*) are, on this subject, in terms equally positive with those of section 332, in which like terms are used and have been judicially passed upon (*Staring agt. Jones, supra; Walton agt. Nat. Loan Soc., 19 How., 515*).

The considerations calling for a strict construction of the statute as to the necessity of the service of the ten days' notice of the judgment (as perfected), above suggested, are equally imperative, and its necessity to entitle the plaintiff to maintain an action against the sureties has been expressly recog-

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nized in the general term of the supreme court (third district) in *Porter* agt. *Kingsbury* (5 *Hun*, 597), not only holding the notice necessary, but that service must be averred in the complaint.

In this view of the rights of the parties, it becomes unnecessary to consider the legal force of the undertaking given under the forms prescribed by sections 354, 355 and 356 of the Code, without exception taken to it as varying from the particular instrument required under sections 334, 335 and 348, or any other of the extremely technical objections occurring during the trial.

Being of the opinion that the suit was, in any view taken of these latter objections, prematurely brought, the judgment should be reversed and a new trial should be ordered, with costs to abide the result.

LARREMORE and J. F. DALY, JJ., concur.

Steiner agt. Ainsworth.

LOUIS STEINER and others agt. CATHARINE AINSWORTH.

Costs — Examination of party before trial.

For attending the examination of a party before trial, ten dollars is taxable under subdivision 8 of section 807 of the Code, where such party attends ready to be examined, although the examination is then waived and is never had.

Saratoga Special Term, November, 1876.

THERE were two actions pending against the same defendant, one in favor of Hecht and others, and the other in favor of Steiner and others.

The answers had been served, and the plaintiffs in each case obtained an order from the Saratoga county judge to examine the defendant before trial under section 391 of the Code.

The defendant and the attorneys for both parties resided at Saratoga Springs.

The orders were returnable at P. M., , 1876, at which time the counsel for both parties and the defendant personally appeared before the county judge and the defendant was sworn and examined in the Hecht case, which was closed within an hour. The plaintiff's attorney then waived any examination of the defendant in the Steiner case, and the defendant was not sworn or examined in that case, but the proceeding was dropped and the cases were afterward discontinued.

The defendant's attorneys claimed ten dollars in each case for attending such hearing before the county judge, and the clerk taxed the same in each bill, and the plaintiff in the

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Steiner case made a motion to review the adjustment of costs in the nature of an appeal from the allowance of that item.

E. F. Bullard, for plaintiff, contended that the attorney for the defendant was paid by the ten dollars allowed in the other case. Second. That, as no examination had ever been had in the Steiner case, the service was never performed for which the statute allows the ten dollars, and, therefore, it should not be taxed against the opposite party.

A. Pond, for defendant.

The court, LONDON, J., held that the ten dollars was properly allowed in each case, and affirmed the adjustment of costs.

Green agt. Lippincott.

SUPREME COURT.

FREDERICK H. GREEN agt. C. LIPPINCOTT and another.

Demurrer to complaint for non-joinder of parties defendant.

Where the complaint alleged that there were "other individuals comprising the firm of J. B. Lippincott & Company" besides the two persons made defendant, *held*, that the other partners are necessary parties, and that to render the omission to make them parties available on demurrer, the defect appearing on the face of the complaint, it was not necessary that it should also appear that the other parties were living.

DEMURRER to complaint.

*Special Term, February, 1877.**Mr. Edward Patterson*, for demurrer.*Mr. R. M. Brown*, opposed.

VAN VORST, *J.*—The statement in the complaint is, in substance, that there are "other individuals comprising the firm of J. B. Lippincott & Company" other than the two defendants named.

As the suit is brought for the alleged breach of a contract made by the copartners with the plaintiff, the other partners are necessary parties, and the omission to make them defendant is a good ground of demurrer, the defect appearing on the face of the complaint.

To make the ground of demurrer available it was not necessary that it should appear in the complaint that the

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other partners were living (*Burgess* agt. *Abbott*, 6 *Hill*, 135 ; *Eaton* agt. *Balcom*, 33 *How.*, 81 ; *Code*, sec. 144, sub. 4).

As to the defect of parties defendant the demurrer is well taken, but I do not regard the objection that several causes of action have been improperly joined as well taken. The cause of action seems to be entire and to rest upon the breach of the contract.

The matter in regard to the retention by the defendants of the books, I do not consider a statement of an independent cause of action. It may, however, add to the defendants' damages for the breach.

The first cause of demurrer is sustained, but the second is overruled.

The plaintiff is at liberty to amend, upon payment of costs.

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N. Y. COMMON PLEAS.

CASSIUS WELLS and LOUIS B. HAAS agt. HENRY SELLING.

Arrest — debt fraudulently contracted — property disposed of with intent to defraud creditors.

Where defendant, in the fall of 1873, began business as a tobacco merchant with a cash or available capital of less than \$2,000, purchased from plaintiffs in November, 1875, and January, 1876, tobacco to the amount of nearly \$4,000, and at the same time, or shortly after, purchased of various other parties large amounts of tobacco, and on February 7th, 1876, made an assignment returning his entire property, at a valuation of \$1,400, without any pretense of any loss by bad debts or otherwise since the date of his purchase from plaintiffs:

Held, that this purchase from plaintiffs without any pretended disclosure of the condition of his affairs, or any reasonable ground for expectation of meeting his obligations, was fraudulent.

Where, during the month of January previous to his assignment, the defendant obtained credits of various parties besides the plaintiffs to the amount of \$7,500 and fails to make any explanation as to its disposition or to show how it, together with what he previously possessed, culminated in the meager show of assets, at the time of his assignment, amounting to less than \$1,500 as estimated by himself:

Held, that he is thus shown, in the absence of any explanation, to have fraudulently disposed of his property with intent to defraud his creditors.

Where the defendant disposed of \$2,800 to his uncle in the latter part of January, 1876, under an assumed indebtedness to him in that amount, the uncle depositing the same sum in bank to a newly-opened account on the third of February, the defendant reappearing on the first of March in full possession of the same business he had previously carried on under a general power of attorney from his wife, and with capital evidently afforded her by the uncle from the \$2,800 that had gone through the formal process of the payment of the debt to the latter:

Held, that this transaction of the assumed payment to the uncle of \$2,800 was a fraudulent disposition of so much of the defendant's property with intent to defraud his creditors.

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Special Term, April, 1877.

MOTION to dismiss proceedings.

The application for the arrest of defendant and respondent was presented to this court on the 24th of April, 1876, upon the ground that the indebtedness, to recover which the action in question was brought, was fraudulently contracted and that the defendant had disposed of a large part of his property with intent to defraud his creditors.

The charge under which the defendant was arrested was under the third and fourth subdivisions of section 8, article 10, chapter 5, part 2, Revised Statutes, the sixth edition, page 47.

The facts set forth in the affidavits on which the application for the arrest of the defendant was based, and which the judge seems to find was established by the evidence, are fully set forth in the opinion.

G. O. Seixas, for plaintiffs.

Richard L. Newcombe, for defendant.

ROBINSON, *J.* — Defendant, in the fall of 1868, began business in this city as a tobacco merchant, with a cash or available capital of less than \$2,000.

In November, 1875, he bought tobacco

co of plaintiffs to the amount of..	\$3,981 87
And paid on account.....	1,500 00

\$2,481 87

On January 17, he bought of them a bill of.....	1,120 95
--	----------

On which the expenses of delivery were.....	63 40
--	-------

\$3,666 22

January 17, 1876, he bought of D. W. King, tobacco to the amount of.....	1,307 41
---	----------

Carried forward.....	\$4,973 63
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Brought forward.....	\$4,973 63	
Same date he bought of R. M. Burdick, tobacco to the amount of.....	623 49	
January 14 and 26, 1876, he bought of S. Bar- nett, tobacco to the amount of.....	3,640 00	
Oct. 19, 1875, he bought of Hubbard & Co., tobacco to the amount of..	\$1,585 30	
On January 14, 1876	635 20	
	<u>\$2,220 50</u>	
On which, Jan. 17, 1876, he paid...	1,000 00	
		1,220 50
January 28, he overdrew from National Trust Co.....		867 66
		<u>\$11,325 28</u>

He owed for money borrowed in 1875 :

J. P. Hornthal.....	\$2,000 00
Louis Hornthal.....	1,200 00
Hornthal Bros.....	1,530 00
Louis Selling.....	550 00
Z. Selling.....	850 00
S. Rappa.....	400 00
D. Selling.....	500 00
A. Hartman.....	400 00
Jos. Hornthal.....	500 00
And other small debts.....	400 00

Making an aggregate of..... \$8,330 00 8,330 00

Making his indebtedness at least..... \$19,755 28

He made an assignment to Moses Hatch, dated February 7, 1876, returning his entire property at a valuation of \$1,400, without any pretense of any loss by bad debts or otherwise, occurring since the date of his purchase from plaintiffs. He then owed, as he asserts, over \$8,000 for money borrowed from his relatives without shadow of means, exceeding \$2,000,

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to pay his debts. That this purchase from plaintiffs, without any pretended disclosure of the condition of his affairs, or any reasonable ground for expectation of meeting his obligations, was fraudulent, can scarcely admit of a question. He discloses no possible or probable condition of his affairs from which any reasonable expectation might be raised or indulged, enabling him to pay the debt he contracted with the plaintiffs. The extraordinary credits he obtained in January, on the very eve of his assignment,

Of plaintiffs, January 17, 1876.....	\$1,120 95
Of D. W. King, same date.....	1,307 41
Of R. M. Burdick, same date.....	623 49
Of S. Barnett, January 14.....	\$1,640 00
And borrowed money, January 26..	2,000 00
	<hr/>
	3,640 00
Overdraft National Trust Co.....	867 66
	<hr/>
	<u>\$7,559 51</u>

Evinces nothing more clearly than that he intended to avail himself of the confidence of his creditors to the utmost, and thus make a grand raid upon them. Of this \$7,500 worth of property obtained in January, he fails to make any explanation as to its disposition or to show how it, together with what he previously possessed, culminated in the meager show of assets on the seventh of February, amounting to less than \$1,500, as estimated by himself.

These main facts are so patent upon the case as disclosed that, without regard to other details involving the collusion and frauds of his conniving relatives, the result is manifest that the debt to plaintiffs was contracted by the defendant without any reasonable expectation of legitimate resources to pay it when due, and that the defendant, out of the property thus acquired from confiding creditors during the latter part of the month of January, to the extent of at least \$7,500, has misappropriated, without regard to what he previously owed,

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all but about \$1,500 of his assets. That he is thus shown, in the absence of any explanation, to have fraudulently disposed of his property with intent to defraud his creditors can scarce admit of a doubt.

The particular transaction by which the defendant disposed of \$2,800 to his uncle, Louis Hornthal, in the latter part of January, 1876, under an assumed indebtedness to him in that amount; the deposit of the same sum by Hornthal in the Butchers and Drovers' Bank in a newly-opened account on the third of February, and the reappearance of the defendant on the first of March in full possession of the same business he had previously carried on under general power of attorney from his wife, and with capital evidently afforded her by Hornthal from the \$2,800 that had gone through the formal process of payment of a debt to the latter, leaves no question in my mind but that the whole was a scheme to defraud defendant's creditors of this sum. Louis Hornthal, it is too apparent, was but a mere tool used to accomplish this end. The transaction is too bald and wanting in every just and fair explanation which, if honest, might readily have been given. I am, therefore, drawn to an irresistible conclusion that this transaction of the assumed payment to Louis Hornthal of \$2,800 was a fraudulent disposition of so much of the defendant's property with intent to defraud his creditors, and, as before mentioned, I also find that he fraudulently contracted the debt for which the suit is brought.

I therefore order his commitment to the county jail to be there detained until discharged according to law, unless he comply with some of the provisions contained in the first four subdivisions of the tenth section of the non-imprisonment act of 1831.

Dickinson agt. Edwards.

SUPREME COURT.

EDWARD R. DICKINSON agt. WILLIAM Y. EDWARDS.

Usury — Promissory note made in this state negotiated in another.

Where a promissory note, signed and dated in New York and payable at a bank here, is negotiated for the first time in another state, the laws of the state where the note is negotiated are to control as to the defense of usury.

The form of the note or obligation may be written here, but it only becomes a note or contract upon its delivery, and it is made when and where it is delivered.

A. made his promissory note, dated in New York and payable at a bank here, and delivered the same to B. who took the note to the state of Massachusetts where it was for the first time negotiated, C discounting it at a rate of interest lawful there, but more than allowed by the laws of this state. In an action by C. against A. on the note:

Held, that it was not void for usury, as the laws of Massachusetts must govern as to this question.

Special Term, March, 1877.

MOTION by plaintiff, upon the judge's minutes, for a new trial.

Mr. M. P. Stafford and *W. R. Beach*, for plaintiff.

Mr. F. P. Bellamy, for defendant.

WESTBROOK, J.—The action was upon a promissory note for the sum of \$300, made by the defendant, payable to the order of Bailey & Gilbert, dated in New York city, November 14, 1874, and payable in said city. The defense was that

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the note was a pure accommodation note, made by Edwards and loaned to Bailey & Gilbert, who procured it to be discounted by the plaintiff at a greater rate of interest than seven per cent, and that it was therefore void for usury.

The reply of the plaintiff was, that the note was not a pure accommodation note, but that Bailey & Gilbert gave their note for the same amount to the defendant in exchange therefor.

It is conceded that the note was negotiated to the plaintiff by Bailey & Gilbert, the payees thereof, in the state of Massachusetts, and that the interest received thereon was no greater than that allowed by the laws of that state, though more than allowed by the laws of New York.

The jury were charged that if the note in suit was given by the defendant to Bailey & Gilbert in exchange for their note of a like amount, their verdict should be in favor of the plaintiff for the sum due thereon. If, on the other hand, they should find that the note was a pure and simple accommodation one, made by the defendant for the benefit of Bailey & Gilbert and loaned to them, that their verdict should be for the defendant.

The jury having found for the defendant, the plaintiff moves for a new trial, because the charge, as he claims, was erroneous in holding that an accommodation note dated in New York and payable in that state and negotiated for the first time in Massachusetts at a rate of interest lawful there, could be declared void for usury, because the rate of interest thus taken was greater than that allowed by the state of New York. An exception at the trial makes the point a proper one to be considered.

The direction given in the charge was based upon *Jewell* agt. *Wright* (30 *N. Y.*, 259), which holds: "Where a promissory note, made and dated in this state and payable at a bank here, is negotiated in another state, the laws of New York are to control as to the defense of usury." As the case enunciating this doctrine was a decision by our highest state

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court, even though the extent of the decision was rendered unnecessary by the statement in the beginning of the opinion of the learned judge who spoke for the court, that confessedly "the note on which the suit was brought was negotiated at a rate of interest illegal, both in Connecticut and New York," it was wise to follow it at circuit, that the question of fact which the case involved might be disposed of, and then have the cause decided upon the pure legal question now involved.

As the case will undoubtedly be reviewed, and the question of fact is disposed of, I see no reason why the conclusions of my own judgment should not now be followed; for, if wrong, they may be readily corrected. No elaborate discussion of the question or cases will be attempted, but my reasons for granting a new trial will be briefly stated.

The same learned judge, INGRAHAM, who wrote the opinion in *Jewell agt. Wright*, also wrote that in *Hildreth agt. Shepard* (65 Barb., 265, 271), in which the doctrine of the former case is maintained. To its correctness I am unable to subscribe.

The fundamental error, in my judgment, upon which those two cases rest, is in the assumption that in a case like the present the note or contract is made here. The form of the note or obligation may be written here, but it only becomes a note or contract upon its delivery, and it is made when and where it is delivered. A and B may have an agreement drawn between them in this state, and they may sign their names to it here, but it does not yet become a complete contract until delivered. If, then, they carry away with them the paper, and deliver it elsewhere, the place of delivery is the place of contract. A borrowed accommodation note handed to the payee, by him to be negotiated when and where he pleases, is, in the hands of the payee, no valid agreement, but merely an undelivered contract, which, handed to him without direction as to the place where, or as to the person by whom, it is to be discounted, is to become a delivered or valid one, whenever and wherever the payee negotiates it.

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When the note is negotiated by a third party, and wherever it is so negotiated, the maker for the first time has contracted by making a valid promise to pay, and not before. It follows from this reasoning that the agreement or promise to pay, though written here, was made in Massachusetts, where it was for the first time negotiated and delivered as a valid instrument, and having been made in Massachusetts, the law of that state governs (*Miller agt. Tiffany*, 1 Wall., 298-310).

In *Tilden agt. Blair* (21 Wall., 241) the draft, though drawn in Illinois, was accepted in New York and payable here. If the writing of the acceptance and its subscription was the making of the contract, it was made in New York. The court, however, held that the acceptors having sent the draft, after acceptance, back to Illinois, for use and discount, that state, and not New York, was the spot where the contract was made, and its law, and not that of New York, must govern the rate of interest and the legality thereof. It is true that the draft was returned to Illinois for negotiation, and from that fact the court drew the conclusion that the acceptors intended to and did make a contract in that state, but the result must have been the same, if it had been merely handed to the party who was to negotiate it, without any restriction as to place of discount. So handing it must be regarded as a general power to go anywhere to negotiate, and as an intention on the part of the acceptors to make at the place of negotiation a valid promise to pay the party advancing the money thereon. The latter is precisely the case before us. The payees took the note without restriction, and had a right to go where they pleased for discount, and the maker made a valid promise to pay, for the first time, when the party empowered so to do delivered and negotiated it.

As the plaintiff in this case is a citizen of Massachusetts seeking to enforce a contract made in that state in our courts, it is very proper, in the final disposition of the cause (*article 3, section 2 of Const. of U. S.*) that the supreme court of the nation should be followed, rather than the highest tribunal of

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our own state. Especially should this reason apply when the decision of the latter court has so often been doubted upon this question (*First Nat. Bank of N. Y.* agt. *Morris*, 1 *Hun*, 680 ; *Bank of Georgia* agt. *Levin*, 45 *Barbour*, 340 ; *Bowen* agt. *Bradley*, 9 *Abb.* [*N. S.*], 395 ; *Providence Co. Savings Bank* agt. *Frost*, 13 *Nat. Bank. Register*, 356).

For the reasons stated a new trial should be granted.

Central Cross-town R. R. Co. agt. Twenty-third Street R. R. Co.

N. Y. SUPERIOR COURT.

CENTRAL CROSS-TOWN RAILROAD COMPANY agt. THE TWENTY-THIRD STREET RAILWAY COMPANY *et al.**Discovery of books and papers of a corporation.*

Averments contained in a petition for an inspection of books and papers of a corporation, merely upon information and belief, failing to disclose the sources of such information, are insufficient to entitle the petitioning party to such inspection.

There should be something more than a mere suspicion or conjecture as to the necessity of the inspection asked for.

Under the Code of Procedure and the rules of court heretofore existing, the practice has been to deny similar applications, where the production of the books and papers desired could be secured by a *subpoena duces tecum*, and the examination as a witness of the party having their custody, either before or on the trial.

Although, perhaps, as against a corporation defendant a *subpoena duces tecum* would have been unavailing under the Code of Procedure, now, by section 868 of the "Code of Remedial Justice," which provides that "the production upon a trial of a book or paper belonging to or under the control of a corporation, may be compelled in like manner as if it were in the hands or under the control of a natural person," a plaintiff has ample means of obtaining the proofs required of a corporation by *subpoena duces tecum* and the examination as a witness of the party having their custody, either before or after the trial.

Special Term, May, 1877.

SANDFORD, J. — The plaintiffs, a street railway corporation, petition for an inspection and copy of certain books and papers of one of the defendant corporations, upon the averment contained in the petition that such an inspection will disclose certain specified facts material and necessary for the

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establishment of the plaintiffs' case. This averment is made merely upon the information and belief of the plaintiffs' president, who fails to disclose the sources of his information otherwise than by way of inference from the fact that he is himself "the president of a street railway company and familiar with the method of keeping books of such corporations." It is further alleged that certain letters which passed between the officers of the said defendant and a person who had contracted with them for the performance of certain work and labor are material as showing a purpose and intent on the part of the plaintiffs, the existence of which is essential to the maintainance of the action.

After a careful examination of the petition, aided by the rules of the court and numerous authorities upon the point, to which reference was made by defendant's counsel upon the argument, I am of opinion that the facts stated in the petition are insufficient to justify the presumption that any entries, correspondence or other documents relating to the subject-matter and tending to establish the plaintiffs' cause of action exist. If the facts alleged in the complaint and put in issue by the answers are assumed to be true there is, perhaps, reasonable ground for the inference that books and documents exist in the possession of the defendants which contain entries relating to the subject-matter, the legal effect of which would be to establish such facts, and particularly if the course of business of other similar corporations indicates that such entries are ordinarily made under like circumstances. But we are not warranted in assuming the truth of the plaintiffs' averments for the purpose of drawing from such assumption an inference in favor of the existence of evidence tending to support them. Such averments should have a more substantial basis than mere suspicion or conjecture; and when a searching examination of an adversary's books and papers is demanded it should be not merely for the purpose of ascertaining whether such averments are well founded, but because there is reasonable ground for the belief

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that, being well founded, they may, in this manner, be satisfactorily proved. Under the Code of Procedure and the rules of court heretofore existing the practice has been to deny similar applications where the production of the books and papers desired could be secured by a *subpoena duces tecum*, and the examination as a witness of the party having their custody, either before or on the trial. It was strenuously urged on the argument of this matter that it should be granted for the very reason that, as against a corporation defendant, a *subpoena duces tecum* would be unavailing. But a reference to section 868 of the "Code of Remedial Justice" discloses a beneficent provision of that statute to the effect that "the production upon a trial of a book or paper belonging to or under the control of a corporation, may be compelled in like manner as if it were in the hands or under the control of a natural person."

Upon the ground, therefore, that under the former practice the averments of the petition do not, in my judgment, present a proper case for resorting to this onerous remedy of a search, and because, under existing provisions of law, the plaintiff has ample means of obtaining the proofs required, if they really exist, without subjecting himself to the imputation of fishing in his adversaries' waters, I deny the motion, with ten dollars costs.

Dupuy agt. Wurtz.

SUPREME COURT.

DUPUY agt. WURTZ.

Costs — extra allowance on appeal from surrogate's court.

On an appeal from a surrogate's court an extra allowance of costs may now be granted under section 309 of the Code of Procedure. Such an appeal is, for all purposes of costs, an action at issue on a question of law, and its determination constitutes a trial within the meaning of the section.

First Department, General Term, April, 1877.

DAVIS, P. J., BRADY and DANIELS, JJ.

IN this case the will of Martha P. Wurtz was offered for probate, and probate was opposed by heirs of the decedent. The will was admitted to probate. An appeal was taken from the surrogate's decision and the general term of the supreme court affirmed the same. The contestants again appealed and the court of appeals affirmed both decisions, declaring the will a valid one and entitled to probate.

On the question of allowances to counsel for the unsuccessful contestants the opinion of the court of appeals, pronounced by RAPALLO, J., and concurred in by all the members of the court, is as follows:

"The questions are not free from difficulty and have been presented, on the part of the contestants, evidently in good faith. They have been argued in this court with great learning and ability, and are carefully and ably treated in the opinion of the learned surrogate. We think that the con-

Dupuy agt. Wurtz.

testants were justified in raising the question, and that, under all the circumstances, the costs of all the parties in this court and the courts below should be paid out of the estate."

An allowance of \$1,000 was thereafter granted to contestant's counsel by the court at special term, Mr. justice BRADY presiding, a like allowance having been previously granted by the surrogate.

From judge BRADY's order an appeal was taken to the general term, where the order appealed from was affirmed, the court delivering the following opinion :

Coudert Brothers, for contestants.

Owen, Nash & Gray, for proponents.

DAVIS, P. J.— This case came into this court by appeal from the decree of the surrogate of the city and county of New York admitting the will in contest to probate. The decree of the surrogate was affirmed by the general term, and on appeal to the court of appeals the judgment of the supreme court was also affirmed (*See Dupuy agt. Wurtz*, 53 N. Y., 556).

The question of costs was disposed of by the court of appeals by directing that the costs of all the parties in that court and the courts below should be paid out of the estate.

It appears that on the decision of the case in this court the surrogate allowed counsel fees to the respective parties, and amongst such allowances the sum of \$1,000 to the contestants' counsel. The special term granted a motion for an additional allowance, and from the order entered thereupon the appeal is taken.

We are of opinion that the court below had power under the Code to grant an allowance. The three hundred and eighteenth section of the Code is clear and explicit. From the time the appeal from the surrogate was brought before the supreme court for review the proceedings are to be deemed

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“an action at issue on a question of law” for all purposes of costs. For such purpose the case is to be treated as an action originally commenced in this court and tried upon an issue of law. *Saguine agt. Saguine* (3 Abb. [N. S.], 442) is precisely in point, and we think was correctly decided.

Wolf agt. Van Nostrand (2 N. Y., 570) and *People agt. New York Central Railroad Co.* (29 *id.*, 428) hold that appellate courts cannot grant the allowance, because the statute gives the same, by way of indemnity, for the expenses of the trial in the court of original jurisdiction. This court, in a late case, has followed these decisions and denied an allowance when no costs were recovered by either party in the court in which the action was tried. But by section 318 of the Code the appellate court is, *pro hac vice*, made the court of original jurisdiction. The objection that an allowance having been made in the surrogate's court none can be made in this, is not well taken. The allowance was exclusively for services in that court, and as the statute makes the appeal to that court *res nova* for the purposes of costs, the court is clothed with full discretion in the matter.

There is no reason to interfere with the order on the ground that the amount was excessive. The order should be affirmed, with costs.

Order affirmed.

Bangs agt. Ocean National Bank.

N. Y. COMMON PLEAS.

FRANCIS N. BANGS *et al.* agt. THE OCEAN NATIONAL BANK.*Pleading — Bill of particulars — Answer — Irrelevant and redundant matter.*

The object of a bill of particulars is but to fairly apprise the party calling for it of the nature of the claim against him, and where the claim is fairly disclosed no further specification is necessary.

The rule, as established by the Code of 1848 as to pleading, only required it to state the facts in ordinary and concise language, without repetition, "and in such manner as to enable a person of common understanding to know what was intended."

It now, by the amendment of 1851, only requires a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition. The spirit and intent of the original enactment has not been changed, and all available rights in this respect is rather the subject of a bill of particulars than of a motion "to make a pleading more definite and certain."

It seems, a motion to strike out matter in an answer as irrelevant and redundant should be granted where the whole is but matter of evidence, and cannot be regarded as any approach to a matter of pleading.

Special Term, April, 1877.

AN order was made on the 15th of January, 1877, requiring the defendants to make certain paragraphs of their amended answer more definite and certain by amendment thereof, and also to serve a verified bill of particulars stating the amounts and times of the payments made by the defendants to the plaintiffs on account of the services of the plaintiffs mentioned in the second paragraph of the amended answer with others. Defendants have attempted to comply with the order, and motion is now made to strike out certain portions as

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irrelevant and redundant, and as an evasion and violation of the order of the 15th of January, 1877. The facts are fully stated in the opinion.

Joseph H. Choate, for motion.

George Bliss, opposed.

ROBINSON, *J.* — The order of the fifteenth day of January last required the defendants "to make the second paragraph of their amended answer more definite and certain by amendment thereof, so as to state when and where and on what occasion either of the plaintiffs stated under oath the value of the plaintiff's services in the Holmes suits — mentioned in the complaint in this action as having been rendered from August 29, 1873, to October 21, 1876 — at a much less amount than is stated in the complaint in this cause as the value of such services, and so as to show what sums such plaintiff then stated, and what he stated concerning such services."

Without appreciating the reason or necessity for this particularity in a matter of pleading, and being unadvised as to the consideration upon which the order was granted, it stands in full force and renders it necessary to determine whether the order has been complied with in the attempted compliance in these words: "That on or about May 29, 1875, the plaintiff, F. N. Bangs, stated under oath, when being examined as a witness before Elial F. Hall, referee, in a proceeding for substitution of attorneys, in this court, that a portion of our (plaintiff's) charge which may properly be apportioned to Holmes No. 1, is \$250, exclusive of interest and disbursements. I think the portion of our entire charge which may be properly allotted to Holmes No. 2, is \$250, exclusive of interest and disbursements." That early in 1876, the plaintiffs brought an action against the defendants, and on a schedule annexed to the complaint, verified by F. N. Bangs,

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they stated the value of their services in Holmes No. 1, at \$250 and \$2.27 disbursements; and in Holmes No. 2, at \$250 and \$5.33 disbursements; and since that time nothing has been done in either of said suits as defendants are informed and believe, except to enter orders of dismissal.

Plaintiffs' motion is to strike this out, as irrelevant and redundant, and as an evasion and violation of the order of the 15th of January, 1877. Had this been an original motion to strike out such matter as irrelevant and redundant, it should, in my opinion, have been granted, as the whole is but matter of evidence, and cannot be regarded as any approach to a matter of pleading; but the plaintiffs having deemed it so material as to require a further and particular answer, the requirement of their order in this respect, so far as the papers disclose, is substantially complied with. It is a specification of all the defendants allege was said by plaintiffs on the subject, and, if conclusive in any respect, plaintiffs have the benefit of that consideration. No such exceptions as were formerly applicable to answers to interrogatories in a bill of discovery have any application to our present system of pleading, and this exception is one that could only be entertained under that practice.

The third paragraph of the order further required defendants, within ten days, to serve a verified bill of particulars, stating the amounts and times of the payments made by the defendants to the plaintiffs on account of the services of the plaintiffs, mentioned in the second paragraph of the amended answer, with others.

Defendants, in response to this, present plaintiffs' account as rendered them on June 17th, 1875, upon which such payments were applied to the plaintiffs' claims for professional services previously rendered, in the matter referred to in the complaint as well as in others. A payment of \$1,500 previously made, August 24, 1874, was therein specifically applied; and the presentation of plaintiffs' account, and the application of that payment as shown on the bill of particulars

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rendered, its appropriation as asserted in the account is made definite. Another payment of \$500, made on September 10th, 1875, is alleged as "on account of the services charged for in said bill." This conclusively adopts the bill, and any payments on account, became in law applicable to satisfy and extinguish the earlier items. It is to be accepted as defendants' claim in respect to the payments alleged in their answer and their proper application. If, notwithstanding, as may be inferred, and as from the assertion "that the defendants claim that some portion of the aggregate of \$2,000 is properly to be credited on account of the services charged for in the second cause of action in the complaint, and referred to in the second paragraph of the amended answer," it shows no ground upon which any such claim can be legally based, and is mere "*fulmen brutum*, and *ex nihilo nihil fit*, plaintiffs cannot complain of the rendering of a particular that in legal effect amounts to nothing (if such be the character of the statement). The motion in this respect is also denied.

The third matter presented is in reference to a counter-claim, in which, after stating that plaintiffs, as their attorneys, had procured orders in their favor for about \$4,800, and entitling them to available judgments therefor, the knowledge of which was wholly concealed from them for thirty days, and they were from such ignorance induced to incur large expense, in endeavors to procure an order of substitution of any attorney able and willing to proceed to collect "said sums" which plaintiffs refused and neglected to do, as also in negotiating with the opposite party for an adjustment of the claim; that, for the period of such concealment and refusal to act, they incurred an expense for services of George Bliss, Esq., as counsel, of \$150, and the services of Theodore M. Davis in making a journey to Lyons, in Iowa, to negotiate with the adverse party for a settlement of the matters in controversy and his "expenses."

This counter-claim of the defendants is based upon allegations and claims made and founded on plaintiffs' neglect of

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duty as their attorney, in failing to keep them advised of the proceedings that had been had in the suit between them and the Bank of Lyons of Iowa, and for such expenses as they were compelled to incur in prudential action, consequent upon the plaintiffs' refusal to proceed in the action. The particulars of this charge of counsel's fees is for the services of such counsel in continuing an endeavor to procure the substitution of any attorney "willing and able to proceed and collect said sums." An exaction by the court of any further details of this service by requiring in a mere pleading a further specification of what services such counsel rendered and what compensation he claimed or became entitled to, or to furnish a bill of particulars of such services, specifying the character of the same, and whether, in continuing said endeavor or in said negotiation, and when and where such services were rendered, and what compensation said counsel claims or is entitled to for such services, seems hypercritical and too technical and refined for serious consideration. The object of a bill of particulars is but to fairly apprise the party calling for it of the nature of the claim against him, and where, as in this case, the occasion and character of the services of counsel is fairly pointed out, no further specification should be exacted. The claim is plainly disclosed in the present case, and no further specification is necessary.

As to the counter-claim for the services rendered by Theodore M. Davis, alleged to have necessarily grown out of plaintiff's neglect of duty in failing to apprise their clients of the condition of the suit, occasioning his employment to travel to Iowa and there negotiating with the Bank of Lyons, and incurring expenses in so doing, the motion to make the pleading of such counter-claim more definite and certain in the minute particulars stated in the notice of motion, is equally excessively exacting as a statement of the claim by way of a pleading. As such it is quite precise, definite and certain, if not already quite too elaborate, and much more so than could be exacted under any system of pleading, either

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previously existing or introduced by the Code. The rule, as established by the Code of 1848, as to pleading, only required it to state the facts in ordinary and concise language, without repetition, "and in such manner as to enable a person of common understanding to know what was intended."

It now, by the amendment of 1851, only requires a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition. The spirit and intent of the original enactment has not been changed, and all available rights sought for by the motion in this respect is rather the subject of a bill of particulars than of any requirement in pleading "to make it more definite and certain."

Motion denied, with costs.

Slater agt. Mead.

SUPREME COURT.

SLATER agt. MEAD *et al.**Jury — Verdict, when will be set aside.*

The jury retired to consider their verdict, and after being absent for a *long time* returned into court and reported that they were unable to agree, and thereupon they were further instructed by the court, and in closing the instructions the court stated to them as follows: "You must agree upon a verdict; I cannot discharge you until you agree upon a verdict." The jury retired and very soon returned into court and rendered their verdict of "no cause of action:"

Held, that this verdict cannot be said to be the judgment of the jury acting without constraint and in the discharge of their obligations to render a true verdict according to the evidence, and, therefore, ought not to stand.

The proper mode of redress in such case is by motion to set aside the verdict.

Wyoming Special Term, December, 1876.

MOTION to set aside verdict. The action was tried at the Wyoming circuit, September, 1876, and a verdict of no cause of action was rendered.

The grounds upon which this motion is made appear in the opinion.

A. J. Lorish, for motion.

D. B. Backenstoer, opposed.

HENDERSON, *J.* — Excluding from consideration the affidavits of the jurymen read upon the hearing, it appears from

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the other affidavits read that the jury retired to consider their verdict and were absent a "long time," when they returned into court and reported that they were unable to agree, and thereupon they were further instructed by the court, and in closing the instructions the court stated to them as follows: "You must agree upon a verdict; I cannot discharge you until you agree upon a verdict." The jury then retired and very soon returned into court and rendered their verdict of no cause of action.

This motion is now made to set aside the verdict on the ground that the foregoing language used by the court to the jury was improper to be addressed to them, as tending to constrain them in their deliberations, and to bring about an agreement from other motives than such as arise from an unbiased consideration of the evidence.

In *Green agt. Telfair* (11 How., 260), justice HARRIS says, in reference to language addressed by the court to the jury very similar to that complained of in this case: "A judge has no right to threaten or intimidate a jury in order to affect their deliberations; I think he has no right even to allude to his own purposes, as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion. The jury, while all proper motives to induce them to agree upon a common result may be repeatedly and earnestly urged upon them, should be left to feel that they act with entire freedom in their deliberations; that, should they continue to disagree, they are not to be exposed to unreasonable inconvenience, nor to receive the animadversion of the court."

The jury, in the case under consideration, had spent a long time in deliberating upon their verdict when they returned into court, and were told by the judge that they could not be discharged until they agreed upon a verdict; the jury again retired and very soon returned and rendered their verdict of no cause of action. These remarks of the justice presiding at the trial were such as would, very probably, induce the

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jury to come to an agreement from a desire to escape longer confinement. No matter how conscientious the individual jurymen may have been in the consideration of the evidence and in his convictions arising therefrom, he was not to be discharged until he should come to an agreement with his associates. After having been so instructed by the court, an almost immediate agreement by the jury upon a verdict followed. This verdict cannot be said to be the judgment of the jury, acting without constraint and in the discharge of their obligations to render a true verdict according to the evidence, and therefore it ought not to stand.

The proper mode of redress is by motion to set aside the verdict (*Caldwell* agt. *New Jersey Steamboat Co.*, 47 N. Y., 282).

Let an order be entered setting aside the verdict.

Cushman agt. Thayer Manufacturing Jewelry Co.

N. Y. COMMON PLEAS.

ANNA M. CUSHMAN agt. THE THAYER MANUFACTURING
JEWELRY COMPANY.

Corporations — action to compel a transfer of stock.

An action or bill in equity may be maintained against a corporation, on behalf of a holder of its stock, to compel a transfer to him by the company on its books.

A court of equity, in a proper case, may decree the transfers of shares of stock on the books of the company.

The customary action by a party injured by the refusal of a corporation to make transfer to him, is an action at law for damage in which he is entitled to recover its full market value.

But where the shares of the capital stock of a corporation have no market value upon which an assessment of damages in an action at law could be based, their value depending upon the future operations of the company, the company having it in their power to suspend its operations *in toto* so as to make the stock of no value, and thus decrease the law damage to a mere trifle, the capital stock being limited and not easily, if at all, procurable in the market, the transfer of the shares owned by plaintiff being effected in fraud of her rights by her husband and one Beales, the transferee, and made on the books of the company by the officers of the company in bad faith, the original certificates not being produced nor properly accounted for, and the transfer being made to one of the officers of the company:

Held, that the equitable power of the court may be invoked and the company compelled to transfer the shares of stock to plaintiffs on their books.

Special Term, April, 1877.

ACTION in equity to compel defendants to transfer upon the books of the corporation certain stock to plaintiff, and to issue new certificates for the same stock to the plaintiff.

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Richard C. Elliott, for plaintiff.

H. F. Anderson and *Robert Sepwell*, for defendant.

J. F. DALY, J.—I am not able to find the report of a case in which a court of equity has entertained an action or bill against a corporation, on behalf of a holder of its stock, to compel a transfer to him by the company on its books; but it is equally true that no authority against such an action or bill can be cited. The customary action by a party injured by the refusal of a corporation to make transfer to him, is an action at law for damage, in which he is entitled to recover its full market value. The leading case in this state on this subject (*Commercial Bank of Buffalo* agt. *Kortright*, 22 *Wend.*, 348) established the right to maintain the action for damages, but did not deny the power of a court of equity to entertain a suit to compel the transfer, a power asserted by the chancellor in his dissenting opinion in that case.

The numerous cases in England and the United States holding that the owner of stock has no right to the remedy by mandamus to compel the transfer, because, as it is said, in those cases he has a complete remedy by action for damages, do not affect this question, except as showing and explaining the reason for the statement by the several judges that the action for damages is a complete remedy; that is, because with his damages so recovered, being the market-price of the stock, plaintiff can go into the market and replace the shares (*Shipley* agt. *Mechanics' Bank*, 10 *J. R.*, 484; *Rev.* agt. *Bank*, *Doug.*, 524). This is said also to be the reason why agreements to sell stock will not be enforced in equity, by the vice-chancellor in *Duncuft* agt. *Albrecht* (12 *Simons*, 189); but the stock spoken of was three per cent, or "stock of that description which is always to be had by any person who chooses to apply for it in the market," and the vice-chancellor decreed specific performance of a contract to sell certain shares of the capital stock of an incorporated railway com-

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pany, which he distinguished from the stock above referred to, for the reason that the shares of a particular company "were limited in number and not always to be had in the market." This distinction has not been observed in any American case, but was the basis of the decree made by the vice-chancellor, he observing that "no decision had been produced to the contrary," and that he deemed such shares a "subject with respect to which an agreement may be made which the court of chancery will enforce." This decision was affirmed by the chancellor. The same distinction was made in effect in *Adderly agt. Dixon* (1 *Simons & Stuart*, 610), an action to compel specific performance of a contract for the sale of debts in bankruptcy. The decree was made, the court saying that while specific performance of a contract for the sale of stock or goods would not be decreed, because damages at law calculated upon the market-price of the stock or goods are as complete a remedy for the purchaser as the delivery of the thing itself, inasmuch as with the damages he may purchase the same quantity of goods or stock, yet, in the case of the sale of debts, upon which dividends would be made, damages at law could not accurately represent the value of the future dividends, and to compel this purchaser to take such damages would be to compel him to sell those dividends at a conjectural price.

In *Pollock agt. National Bank* (7 *N. Y.*, 274) a decree was made compelling the bank to issue new certificates of stock where the original certificates had been given up to the bank and destroyed, and the shares transferred on its books by virtue of a forged power of attorney; the decree provided that if the bank had no stock to issue, judgment for the value of the shares should be entered. All the objections which could be urged against a decree to compel transfer on the books were urged against such decree, to compel the issue of new certificates, by the learned judge who wrote the dissenting opinion in that case, but he stood alone in his position as to the proper remedy in the case.

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We have authority, therefore, for the following propositions: That, as between vendor and vendee of shares of stock in incorporated companies which shares are not to be easily had in the market owing to the limited stock of the company, or which have no market value and depend upon the future dividends for any value they may possess, such shares are a subject with respect to which an action in equity for specific performance may be maintained (*Duncraft agt. Albrecht, supra*; see also *Aderly agt. Dixon, id.*). And that as between the owner of shares and the company resisting his claim as stockholder and setting up the claims of another as such owner, a decree in equity for the issue of new certificates may be had where the original certificates were wrongfully surrendered and thereafter destroyed in good faith by the bank, and certificates issued and transfer made to such other party (*Pollock agt. National Bank, supra*).

With this exercise of equitable power over such subject-matter before us, it seems not difficult to hold that in a proper case transfer of shares on the books of the company may be decreed.

I regard this as a proper case for the following reasons: The shares of the capital stock of the defendant, the Thayer Manufacturing Jewelry Company, have no market value upon which an assessment of damages in an action at law could be based; their value depends upon the future operations of the company, and if plaintiff were remitted to her action at law damages, the officers of the company have it in their power to suspend its operations *in toto*, so as to make the stock apparently of no value, and thus decrease the damages to a mere trifle. The capital stock is limited and not easily, if at all, procurable in the market. The transfer of the shares owned by plaintiff was effected in fraud of her rights by her husband and Mr. Beales, the transferee, and made on the books of the company by the officers of the company in bad faith, the original certificates not being produced nor properly accounted for, and the transfer being

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made to one of the officers of the company. It is the duty of the company to resist the transfer on its books without production and surrender of the outstanding certificates, or proof of loss or destruction, and proof that the real owner has applied for a new certificate (*Smith agt. The American Coal Co., 7 Lansing, 321*).

The defendant having waived on the trial all objection to the action or the relief demanded based on the fact that the transferee, Mr. Beales, was not a party to the action, the plaintiff may have the judgment demanded in the complaint, with costs.

Keteltas agt. Keteltas.

SUPREME COURT.

MARY C. KETELTAS agt. EUGENE M. KETELTAS and HENRY W. CLARK, as executors of the last will and testament of WILLIAM A. KETELTAS, and others.

Will — Action to obtain construction of.

A widow can maintain an action to obtain a construction of her husband's will.

New York Special Term, March, 1877.

IN February, 1873, the testator made his last will and testament, and, after providing for certain legacies, he directed his executors to pay and divide the residue of his estate as mentioned in the opinion of the court. On the 24th of October, 1875, the plaintiff and deceased were married. The testator died in January, 1876, leaving real property of the value of \$100,000, and \$150,000 in personal estate. The executors claim that, by the will of the testator, the plaintiff, his widow, is not entitled to any share in the personalty. She instituted this action for a construction of the will. The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

S. P. Nash, for defendants, in support of demurrer, cited *Chipman agt. Montgomery* (63 *N. Y. R.*, 221); *Bailey agt. Briggs* (56 *id.*, 407).

C. Bainbridge Smith, for plaintiff, opposing, cited *Cotton agt. Cotton* (2 *Beaven*, 67); *Bowers agt. Smith* (10 *Paige*, Vol. LIII.

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190); *Bailey agt. Briggs* (56 *N. Y. R.*, 407); *Kiah agt. Grenier* (1 *N. Y. S. C.*, 388; *affirmed*, 56 *N. Y. R.*, 220); *Stagg agt. Jackson* (1 *id.*, 206); *Mannice agt. Mannice* (43 *id.*, 304); *Walworth agt. Handy* (24 *How. Pr.*, 353).

VAN BRUNT, *J.* — This is an action brought to obtain the construction of the will of William A. Keteltas, deceased, which will was executed on the 10th of Februry, 1873. On the 24th of October, 1875, the complaint alleges that the plaintiff and the deceased were married.

By the ninth clause of his will the testator directed his executors, after the payment of certain legacies, to apportion, divide and pay the rest, residue and remainder of his estate to, between and among his next of kin, according to the statute of the state of New York now in force concerning the distribution of personal estate of intestates, in like manner as though he had died intestate.

The complaint in this action is filed to have the court determine as to whether or not the plaintiff, as such widow, is entitled to any portion of the residuary estate. The defendants demur, upon the ground that the complaint does not state facts sufficient to constitute a cause of action. It is urged, upon the part of the defendants, that actions for the construction of wills can only be maintained by trustees and persons occupying a similar position, and cites, as authorities for this position, the cases of *Chipman agt. Montgomery* (63 *N. Y. R.*, 221), and *Bailey agt. Briggs* (56 *N. Y. R.*, 407). These cases, it seems to me, fail to establish the position claimed by the defendants. They expressly recognize the right of a *cestui que trust* or person interested in a will to move the court, as well as an executor or trustee, for a construction of a doubtful or disputed clause in a will. If the plaintiff is interested under the will she, therefore, has a right to maintain this action. It is true that the whole question as to her right under the will might have been presented upon the demurrer, but as those questions were not argued I shall not

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discuss them ; but I must dispose of the demurrer, assuming that the plaintiff is interested under the will.

I think the authorities cited clearly show that the right to maintain an action for the construction of a will is not confined to executors or trustees, but extends to every person having an interest under the will. The case of *Chipman* agt. *Montgomery*, upon this point, only decides that an action cannot be maintained for a construction of a will by parties claiming in hostility to it.

The demurrer must be overruled and defendants have leave to answer upon payment of costs.

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N. Y. COMMON PLEAS.

ISRAEL RANDOLPH agt. THE MAYOR, &C., OF NEW YORK.

Contract to build sewers — right of city to retain money as a penalty for failure to complete within time specified — Answer — Counter-claim.

In a contract with the city for the building of sewers, it was provided that the contractors should satisfy all liens for work or materials, filed with the commissioner of public works (the contracting department), before or within ten days after the completion of the work, otherwise the city should be entitled to retain or deduct such sum from the contract-price. The only notice of lien filed was left with the finance department, some six months after the work was completed:

Held, that the lien not having been filed in the proper department within the proper time, the city had no right to deduct or retain the amount of the same.

The contractors were required, by the terms of the contract, to complete the work within ninety days after the day the commissioner should designate for commencing it, and in case of default the city was entitled to deduct from the contract-price the sum paid for inspectors' wages for each and every day the aggregate time of all the inspectors on the work appointed by the commissioner might exceed the stipulated time for its completion. The contract provided that the contractors should commence the work on such day as the commissioner should designate. No notice or designation of a day for the commencement of the work was ever given to the contractor by the commissioner, but the contractors, after applying to the commissioner for such designation and receiving no orders, began the work at their own risk on June 8, 1871:

Held, that the date for fixing the period of time from which the ninety days were to be computed was the day of the actual commencement of the work. The mere placing of an inspector at some particular point of the street where the work was to be performed, was not the notice intended by the provision of the contract.

Where a plaintiff does not reply to an answer setting up counter-claims, it is an admission that they were due and owing by plaintiff, and the defendant may avail himself of such admission.

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But the defendant waives this advantage if he goes into proof of the counter-claim, and by such proof shows that it could not properly have been set off against plaintiff's demand.

General Term, November, 1874.

THE plaintiff, as assignee, brought this action to recover from the defendants the balance due on a contract to build certain sewers in the city of New York executed by his assignors, Messrs. Allen and Henry, and the defendants. The contract and the right to receive the money due and to grow due thereunder was assigned by the contractors to the plaintiff October 2, 1871, and the commissioner of public works, on notice, approved and allowed such assignment. The defendants, by their answer, admit that something is due the plaintiff, but refuse to pay the sum claimed by him because: First. The contractors did not complete the work within the limit of ninety days, the time fixed by the contract, and the city had paid to inspectors for inspecting the work, after the expiration of the ninety days, the sum of \$1,288. Second. That they were entitled to retain until June 9th, 1872, the sum of \$435.60 as security for the relaying of pavement. Third. That the contractors owed the city for sewer pipes, sold them by the department of public works, the sum of \$1,351.70. Fourth. That certain material-men had filed liens against the contractors in the sum of \$335. The plaintiffs claimed the right to recover \$5,498.72. The defendants claimed the right to retain these several sums, amounting to \$3,410.36, leaving admitted a balance due of \$2,088.42. On the trial it appeared that there was no pavement laid in the street and the defendants withdrew their claim to the sum of \$435.60 as security for relaying the pavement. The plaintiff admitted the right of the defendants to retain \$1,351.70, the price of sewer pipes furnished by the department of public works. The case was thus narrowed down to the question whether the defendants had a right to retain \$1,288 for "excess of inspection" and \$335 claimed to be covered by

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liens filed. The referee found that the city had not the right to retain the money, and reported that the sum of \$4,807.31 was due plaintiff, and the defendants appeal.

Elliot Sandford, for respondent.

I. As to the right to retain \$335. The contract required the contractors to satisfy all liens for work or materials filed with the commissioner of public works, the contracting department, before or within ten days after the completion of their work. In this case no notice of lien was shown to have been filed with the contracting department, the department of public works. The only notice of lien filed was left with the comptroller in the finance department, and that was filed six months after the work was completed. The liens not having been filed in the proper department within the proper time, the defendants have no right to retain the sum of \$335. This claim did not exist against the assignors at the time when the assignment to the plaintiff was made, October 2, 1871, and cannot now be made the subject of a counter-claim against the plaintiff on the record (*Code, sec. 150; Martin agt. Kunsmuller, 37 N. Y., 396*).

II. As to the right claimed by the defendants to retain \$1,288 alleged to have been paid by them to certain inspectors. The proposals for contracts contained a notice that bidders are specially notified that the commissioner of public works reserves the right to determine the place and time for commencing the work. And the contract contained a provision that the work should be prosecuted at such time as the commissioner should direct; also that the contractors should commence the work on such day as the said commissioner should designate, and should complete the same on or before the expiration of ninety days, next thereafter. The evidence of both contractors was presented on the trial that the commissioner never gave them any notice fixing the day on which work should be commenced, although application was twice made in writing therefor. They never had any notice from

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any one, and work was actually commenced without notice. The contract contained also a clause by which the contractors agreed that the defendants might retain, as a penalty for the non-completion of the work within the stipulated time, the sum paid for inspectors' wages at the rate of four dollars per day. No time to begin the work ever having been fixed by the commissioner of public works, the stipulated time never began to run, and the contractors were *quasi* trespassers until their work was accepted by the city. The right to retain money as a penalty should be clear and strictly construed and beyond a doubt. When one who contracts to have work done for him omits to do something on his part which is essential before the work can be begun, and by which the other party is delayed, the strict condition in respect to time is waived (*Green* agt. *Haines*, 1 *Hilton*, 254; *Fleming* agt. *Gilbert*, 3 *Johns.*, 531; *Shute* agt. *Hamilton*, 3 *Daly*, 466; *Holmes* agt. *Groff*, 3 *M. & W.*, 380). The contractors were also delayed by the failure on the part of the defendants to pay ten per cent on the value of such work done, in monthly installments, due under the contract. The first payment was not made till June, 1872, although due and demanded in September, 1871. The defendants claim that the commissioner of public works had the right to appoint, and appointed, three inspectors, and that their appointments, of which no notice was given to the contractors, was a designation of the time when the work should be commenced by them. In fact the contract bears date May 23, 1871, and two inspectors were appointed by Wm. M. Tweed, then commissioner, on that very day, and a third six days later. And while the contractors were seeking permission to commence their work inspectors were already on the street earning each his four dollars per day. This was not an unfrequent thing in those days, and most contractors suffered it without resistance. Thus the alleged right to retain money paid for excess of inspection arose. There was no proof presented before the referee that the defendants had paid, or, were liable to pay,

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\$1,288 as inspectors' wages. A bill for services was offered in evidence, with an affidavit annexed, dated November, 1871, and exception was taken to this as not the best evidence. This was the only proof presented on this point. It was shown that these inspectors were not present every day on the work, and that Mr. Van Nort, commissioner of public works, when the sewer was completed and accepted by the city, was informed that payment to the inspectors should be disallowed.

III. After all the testimony had been taken the defendants' attorney requested the referee to hold that the second, third, fourth and fifth paragraphs of the answer contained new matter constituting counter-claims, and that as no reply had been made these counter-claims had been admitted. This the referee refused. The answer did not expressly state that the facts were set up by way of counter-claim, and unless this is done they will be deemed to be defenses and not counter-claims (*Burrall agt. De Groot*, 5 *Duer*, 382). The defendants' answer merely alleges matter which, if true, shows that the plaintiff never had a cause of action against them to the amount claimed in the complaint, and it contains no demand for affirmative relief (2 *How.*, 310). No reply was necessary in this case (22 *How.*, 290; 8 *id.*, 122; *id.*, 146). When the plaintiff does not reply and may be deemed to admit a counter-claim the defendant waives this advantage if he goes into proof of the counter-claim, and by such proof shows that it could not properly have been set off against plaintiff's demand (*Campbell agt. Genet*, 2 *Hill.*, 295). The alleged counter-claim must be one existing in favor of a defendant against the plaintiff on the record (*Code*, sec. 150; *Gleason agt. Moen*, 2 *Duer*, 639; *Vassaer agt. Livingston*, 13 *N. Y.*, 248; *Caryl agt. Williams*, 7 *Lans.*, 418).

IV. At the time the assignment was made to the plaintiff, October 22, 1871, these alleged counter-claims did not exist, and until a demand becomes mature it may be defeated by the assignment of the claim (*Watt agt. The Mayor*, 1 *Sand-*

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ford, 23; *Myers* agt. *Davis*, 22 *N. Y.*, 489). The report of the referee is presumptively correct. It is assumed to be right and to be founded upon proof, and will not be disturbed, except when clearly against evidence (27 *How.*, 1; 2 *Sweeny*, 605; 35 *Barb.*, 602; 44 *N. Y.*, 601). The judgment below should be affirmed.

E. Delafield Smith, for appellants.

I. Paragraphs 2 and 5 of defendants' answer were counter-claims within the meaning of the Code, and no reply having been interposed by the plaintiff they should have been taken as true. (a.) No particular form of words is necessary to make a pleading a counter-claim. It is sufficient if the defendant intimates, in reasonable language, that he intends to make a personal claim in his own favor against the plaintiff (*Bates* agt. *Rosekrans*, 37 *N. Y.*, 409). (b.) The counter-claim of the Code includes both set-off and recoupment, and is broader and more comprehensive than either (*Vassear* agt. *Livingston*, 13 *N. Y.*, 248; *Clinton* agt. *Eddy*, 1 *Lans.*, 61; *Xenia Bank* agt. *Lee*, 2 *Bosw.*, 694; *Leavenworth* agt. *Packer*, 52 *Barb.*, 132; *Pattison* agt. *Richards*, 22 *Barb.*, 143; *Lemon* agt. *Trull*, 16 *How.*, 576). (c.) This is a case of recoupment (*Nichols* agt. *Dusenbury*, 2 *N. Y.*, 286; *Batterman* agt. *Pierce*, 3 *Hill*, 171; *McAllister* agt. *Reab*, 4 *Wend.*, 483; *Still* agt. *Hall*, 20 *id.*, 51; *Ives et al.* agt. *Van Epps et al.*, 22 *Wend.*, 155, *opinion by* COWEN, J.). (d.) This claim existed, at the time this action was commenced, in favor of the defendants and against the plaintiff. The contract authorizes the parties of the first part to deduct from the moneys to grow due thereunder any excess of inspection paid by them. Paragraph 2 of the answer not only states that \$1,288 was paid to inspectors, but it alleges that defendants are entitled to deduct and retain this amount from the \$5,498.72, for which the plaintiff brings his action. In other words defendants seek to recoup this amount. The allegations in the fifth paragraph of the answer are similar in form.

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II. The referee erred in finding as a conclusion of law that the plaintiff is entitled to recover \$4,147, with interest from the 9th day of December, 1871. (a.) The contract provides for the building of three sewers. It further provides that the commissioner of public works reserves the right to determine the time and places for commencing and prosecuting the work. Another provision authorizes the commissioner to determine the number of inspectors to be placed upon the work, and goes on to say that "the *aggregate time* of all the inspectors so employed, will be the time with which the time stipulated for the completion of the work under this agreement will be compared. The inspectors will be paid each at the rate of four dollars a day." Plaintiff or his assignors were allowed ninety days in which to complete the work. Ten days were subsequently allowed for extra work, making in all 100 days. There was an excess of 322 days. By the terms of the contract the commissioner was authorized to deduct and retain out of the moneys to grow due on the contract the sum paid for inspectors' wages for each and every day the aggregate time of all the inspectors employed upon said work might exceed the said stipulated time for its completion. See, also, the same provisions. (b.) Mr. Towle, defendants' engineer, in charge of the department of sewers, testifies as follows: First. That three inspectors were placed on the work, one for each separate sewer. Two were placed on the work on the day, or about the day, of the execution of contract, and the third a few days afterwards. Second. The commissioner of public works designated generally that the work should begin on signing of contract, and as soon thereafter as inspectors were appointed. The days upon which inspectors were placed upon the different sections of this work were, respectively, the days designated by the commissioner for the contractor to begin work. Third. The time of inspectors on the sewers in question, as shown by the records of the department of public works, exceed the time stipulated for by the contract, 322 days. Fourth. The commissioner

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of public works bases his knowledge of the number of days charged for by inspectors upon the sworn statements of each inspector, monthly, of the number of days he is at work. Fifth. The inspectors' bills show an excess of inspection of 322 days.

III. The exception to the referee's ruling on the admission of the question at folio 72 was well taken. Question. "Is it customary, in jobs of this nature, to give contractors any further notice to commence work than is given by placing the inspectors on the work?" (a.) It was competent to show by the witness, Mr. Towle, the general custom in the department (*Wadsworth agt. Alcott*, 6 *N. Y.*, 72, *opinion*; *PAIGE, J.*; *Hinton agt. Locke*, 5 *Hill*, 437, *opinion*, *BRONSON, J.*; *Goodrich agt. Ogden*, 4 *id.*, 104; *Dawson agt. Kettle*, *id.*, 167; *Smith agt. Wilson*, 3 *Barn. & Adol.*, 728; *Cooper agt. Kane*, 19 *Wend.*, 384; *Sewall agt. Gibbs*, 1 *Hall*, 602; *Whitnel agt. Gratham*, 6 *T. R.*, 398). In this case Lord KENYON says: "Evidence of usage is admissible to expound a private deed as well as the king's charter." (*Rushforth agt. Hadfield et al.*, 6 *East*, 519; *Kirkman agt. Shawcross*, 6 *T. R.*, 14; *Phillips on Evidence*, vol. 2, pp. 336 to 350). (b.) The contract provides as follows: "The said parties of the first part hereby further agree that they will commence the aforesaid work on such day as said commissioner may designate." * * * If, then, the placing of inspectors on the work was the usual mode of designating when it should begin, the referee should have allowed the question. (c.) The contractors actually commenced the work without any written or verbal instructions from the commissioner. The judgment should be reversed.

J. F. DALY, J.—The defendants' counter-claim for sewer pipe furnished plaintiff in the construction of the sewer was admitted and allowed on the trial and deducted from plaintiff's claim and judgment given for the balance. Two other counter-claims, one for liens filed by persons furnishing mate-

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rials to the contractors, and one for the moneys retained as security for repairing, were not allowed by the referee, for the reason, it is presumed, that they were not proven. No reply was ever served by plaintiff to the defendant's answer setting up those counter-claims. This was an admission that they were due and owing by plaintiff, and defendants might have availed themselves of such admission; they did not, but offered on the trial proof in support of each item of set-off or recoupment. If they failed to support their claims by the proof offered they lose the benefit of the admission (*Campbell agt. Genet, 2 Hill, 295*).

The rule laid down in that case is a reasonable one. If defendants intend to rely upon the admission made by the failure to serve a reply, they should rest upon it at the trial, and plaintiff having notice of their intention may then apply to the court for leave to serve a reply, which leave the court has power to grant. But if they waive the admission and go into proof of their counter-claim, it seems only just to give such judgment as the proof may warrant. A perusal of the case satisfies me that the referee did not err in rejecting those two counter-claims.

I. The contract with the city provided, that the contractors were to furnish the commissioners of public works with satisfactory evidence, that all persons who give said commissioners before or within ten days after the completion of the work written notice, that a balance for work or material or compensation for injury or damage is due and unpaid, have been fully paid or secured therefor.

There is no proof whatever that the alleged claimants, Calwell and Hogan, ever gave such notice to the commissioner, but on the contrary, the proof shows that such notices of lien were filed with the finance department, and not filed there until some months after the completion of the contract.

II. There is no proof that the city was compelled to repair the pavement of the street, nor that they had any right to retain beyond June 9, 1872, the time specified in the con-

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tract, the sum of \$435.60, which they kept back pursuant to its terms as security for the proper relaying of the pavement.

The referee erred, however, in rejecting the other counterclaim of defendants, viz., moneys paid out for inspectors' fees, the contractors having failed to complete the work within the time specified in the contract. I do not consider that defendants are entitled to the full amount claimed by them, because I am of opinion that no charge should be made for inspectors' pay before the date of the actual commencement of the work. The contractors were required by the terms of the contract to complete the work within ninety days after the day the commissioner of public works should designate for commencing it, and in case of default the city was to deduct from the contract price the sum paid for inspectors' wages, for each and every day the aggregate time of all the inspectors on the work appointed by the commissioner of public works might exceed the stipulated time for its completion. No notice was ever given to the contractors by the commissioner to commence the work, and no day was designated by him for that purpose. The contractors applied to the commissioner for such designation, but received no orders. They began the work at their own risk, on June 8, 1871, sixteen days after the contract was signed. They completed it in 174 days, which, deducting Sundays and holidays, and ten days extra time, all of which were allowed them, made about 137 days altogether, or forty-seven days beyond the time fixed by the contract. As no time was designated by the commissioner for commencing the work, there can be no other data for fixing the period of time from which the ninety days were to be computed, except the day of the actual commencement of the work, but an effort was made by defendants to show a designation of an earlier date.

A witness for defendants, Stevenson Fowler, testified that he was engineer in charge of the sewer department of the public works; that an inspector was appointed by an

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appointment in writing, filed in the department of public works, and was placed on the work the same day that the contract was executed, and that that was the designation by the commissioner of public works of the time of commencement of the work and that there was no other designation except that. He was asked if it were customary, in jobs of this nature, to give contractors any further notice to commence work than by placing inspectors on the work. This was objected to by plaintiffs and ruled out by the referee, to which defendants excepted. I do not think the question was proper. The contract dated May 23, 1871, provided that the contractors should commence the work on such day as the commissioner should designate; that it was to be prosecuted at such times, and in such parts of the street on the line of the work, and with such force as the commissioner might from time to time during the progress of the work determine, at each of which points an inspector would be placed to supervise the same; that the aggregate time of all the inspectors so employed, would be the time with which the time stipulated for the completion of the work would be compared. These provisions indicate clearly that the day for the commencement of the work is to be fixed by some notice to the contractor, other than the placing of an inspector at some particular point of the street where the work is to be performed. An inspector of the work can hardly be said to be placed on the work until the work is commenced or a time is designated for its commencement. If the only notice to the contractors is to be the placing of an inspector on the street, it involves the necessity of a daily patrol of the locality by the contractor to ascertain whether an inspector is placed there. By what external marks and signs an inspector is to be recognized among the other citizens who appear on the streets, by the contractors, we are not informed. It is not shown that the contractors knew the inspector or how he was to be identified, when he appeared at the place of work. The work itself was to be

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commenced in sections at any point the commissioner might designate, and consisted in building three sewers in One Hundred and Ninth street and Fourth avenue, and between First and Third avenues, emptying into the First avenue sewer; and between Third and Lexington avenue, emptying into the Third avenue sewer; and one between Lexington and Fourth avenue sewer, emptying into Fourth avenue sewer. The extent of street in a straight line in which these sewers were to be laid was about half a mile, at any point at which the work was to be begun, as directed by the commissioner. A custom or usage of the department to designate the point at which, and the day on which the work was to begin, by placing an inspector at each point, amounts in effect to no notice at all, and proof of such custom without offering to show that the contractor knew the inspector, or that it was customary to file in the department of public works a designation of the point at which the work was to begin, and that the contractors had knowledge of the custom, would be insufficient to charge the contractors in the face of the express provisions of the contract, which plainly indicate a specific designation to be made by the commissioner, and as plainly indicate that the inspector is to be placed on the work after such designation is made, and not as the notice or designation itself. But even excluding the time between the date of the contract and the actual commencement of the work, the contractors exceeded the ninety days allowed by the contract. The contractors waived a designation by the commissioner of public works, and commenced the work on June the eighth. But this did not relieve them from the obligation to complete the work within the time specified in the contract, any more than it relieved them from the performance of their other obligations. The judgment should be reversed and a new trial should be granted, with costs to abide events.

On the second trial the jury found in favor of the plaintiff for the full amount claimed, and no appeal therefrom was taken.

Baldwin agt. Briggs.

SUPREME COURT.

TOWNSEND B. BALDWIN agt. WILLIAM H. BRIGGS.

Counter-claim — when cannot be set up.

Where one defendant is sued upon an individual liability, he cannot set up as a counter-claim a claim which he holds jointly with another against the plaintiff.

Special Term, February, 1874.

VAN BRUNT, J. — It seems to me that the demurrer in this action must be sustained. There are many cases which decide that in a suit against two or more persons or partners a several claim in favor of one defendant only cannot be enforced as a counter-claim (*Hurlburt agt. Post*, 1 *Bosw.*, 28; *Peabody agt. Bloomer*, 3 *Abb. Pr.*, 353; 6 *Duer*, 53; *Mott agt. Burnett*, 2 *E. D. Smith*, 50). I can see no reason why the converse of the proposition should not be equally true, viz., that where one defendant is sued upon an individual liability he cannot set up as a counter-claim a claim which he holds jointly with another against the plaintiff. The cause of action constituting the counter-claim must be one existing in favor of a defendant against a plaintiff, between whom a several judgment might be had in the action (*Sec. 150 of the Code*). The cause of action set up as a counter-claim in the action does not exist in favor of the defendant and his copartner against the plaintiff, and this does not comply with the requirements of the section. Furthermore, in litigating a claim either made by a firm or against a firm, the opposite party has a right to have all the members of that firm before the court. The demurrer must be sustained, with leave to the defendant to amend his answer, upon payment of costs, if he be so advised.

Baldwin agt. Berrian.

SUPREME COURT.

TOWNSEND B. BALDWIN agt. JOHN BERRIAN.

Answer — Counter-claim — Demurrer to answer.

Where the answer sets up by way of counter-claim certain transactions of plaintiffs with the defendant and his copartner, who is not a party to the action, a demurrer to the answer will be sustained.

Special Term, 1877.

THE action is upon a promissory note for \$3,224.94, made by defendant to order of Baldwin & Kimball, the plaintiffs. The answer set up, among other things, by way of counter-claim, that the plaintiffs had certain transactions with the defendant and his copartner, Briggs, who was not a party to the action, in which the plaintiffs made certain usurious charges against such firm, which amounted in the aggregate to \$1,365.65, half of which defendant claimed was due him, and entered into and constituted part of the consideration of the note.

E. B. Cowles, for plaintiff.*H. Y. Cummins*, for defendant.

VAN BRUNT, J. — The demurrer to that part of the answer which seeks to set up, as a counter-claim to the cause of action alleged in the complaint, causes of action arising out of transactions between the plaintiff and the firm of Berrian & Briggs must be sustained for the rea-

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sons stated in the case of *Baldwin agt. Briggs* (*Ante*, p. 80). The defendant would undoubtedly, as matter of defense, have the right to show that any portion of the whole of the consideration of the note in suit had been made up, upon a balancing of the account between the plaintiffs and the firm of Berrian & Briggs, of his share of an alleged indebtedness from Berrian & Briggs to the plaintiffs, which indebtedness consisted of illegal exactions of interest duly specified, and in payment of which the note in suit was given. The answer, however, wholly fails to allege any balancing of accounts or the separation of the defendant's and Briggs' indebtedness to the plaintiff, or that the same was given in payment therefor as far as that part of the answer demurred to is concerned. The demurrer is, therefore, sustained, with leave to defendant to amend upon payment of costs.

Gemp agt. Pratt.

N. Y. COMMON PLEAS.

FREDERICK GEMP agt. JAMES PRATT.

Jurisdiction of the court of common pleas.

By the act of 1873, chapter 239, the court of common pleas of the city of New York has jurisdiction over a defendant, served with process in any county of the state, and this includes actions where the cause of action arose in the city of New York, but the defendant did not reside there, as well as actions where the cause of action did not arise and defendant did not reside in the city.

The "Code of Civil Procedure," section 263, subdivision 2, provides in express terms that this court shall have jurisdiction in such cases, and the codifiers state that revision to be, in their opinion, declaratory of the law as it now exists.

Special Term, May, 1877.

MOTION to set aside service of summons and complaint on the ground that the court (of common pleas for the city and county of New York) has no jurisdiction.

The complaint sets forth a cause of action for goods sold and delivered to defendant at the city of New York.

The summons and complaint were served upon defendant in Queens county, state of New York, where he then resided.

J. F. DALY, J. — Under section 33 of the Code this court had no jurisdiction of a merely personal or transitory action, unless the defendant was a resident of the city of New York or was served with the summons therein. The act of 1873, chapter 239, conferred jurisdiction over a defendant served with our process in any county of the state, and this included, of course, actions where the cause of action arose in the city of

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New York, but the defendant did not reside there, as well as actions where the cause of action did not arise and defendant did not reside in this city, although jurisdiction was not specifically given in either case and general language only was used to extend the jurisdiction. In *Sanders* agt. *Staten Island Railroad Company* (53 *N. Y.*, 450), the court of appeals held that the legislature had no power to confer on a local court (the city court of Brooklyn) jurisdiction of a personal or transitory action where the cause of action did not arise in the city where such court was located; if the defendant did not reside or was not served with the summons in such city. The case of *Hoag* agt. *Lamont* (60 *N. Y.*, 96), was substantially to the same effect.

In *Bidwell* agt. *Astor Mutual Life Insurance Company* (16 *N. Y.*, 263), and *International Bank* agt. *Bradley* (19 *N. Y.*, 245), judgments of the superior court of Buffalo, a local court, were sustained, the cause of action having arisen in that city, but defendants served elsewhere, being non-residents of the city.

But, in the case of the superior court of Buffalo and the city court of Brooklyn, jurisdiction in cases where the cause of action arose in the respective cities where those courts were located, independent of the residence of defendants or the service of the summons, was expressly conferred in terms by the statutes (*As to Buffalo, Laws of 1854, chap. 96, sections 9 and 10; as to Brooklyn, Laws of 1870, chap. 470; Laws of 1871, chap. 282*).

But in the cases cited, respecting the jurisdiction of the superior court of Buffalo (16 *N. Y.*, 263; 19 *id.*, 245), the question of the constitutionality of the provisions of law conferring such jurisdiction was not considered; and, in the cases respecting the jurisdiction of the city court of Brooklyn (53 *N. Y.*, 450; 60 *id.*, 96), there is no express decision that such jurisdiction was properly conferred, but, on the other hand, no intimation to the contrary.

As I have said, such jurisdiction is not conferred upon the

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court of common pleas in express terms, but is included in the general enlargement of jurisdiction enacted by the legislature in 1873. Whatever enlarged jurisdiction conferred by the act of 1873 does not fall within the view of the decision in the cases of *Sanders* and *Lamont* (*supra*), but may be exercised without violating the spirit of those cases, it is the duty of this court to exercise when suitors require it.

The conferring upon a local court (whose jurisdiction is general and unlimited, except as to territory) by the legislature, under the provisions of article 6, section 14, of jurisdiction over personal actions, where the cause of action arose in the city in which such court is established, is not such an infringement of the Constitution (*art. 6, sec. 6*) relating to the general jurisdiction of the supreme court and the judicial system of the state, as the jurisdiction attempted to be exercised in the *Sanders Case* and the *Lamont Case* (*supra*). Where parties who do not reside in the city come there to make contracts, the legislature may well give to the local courts of the city power to enforce the contract or to entertain an action for the breach of it, even if it be necessary to send its process into other parts of the state in order to summon the defendants to answer. Especially is this the case where the defendants only are non-residents of the city.

The remedial code (*sec. 263, sub. 2*) provides, in express terms, that this court shall have jurisdiction in such cases, and the codifiers state that provision to be, in their opinion, declaratory of the law as it now exists.

The case of *Toole agt. Covert* (15 *Abb. [N. S.]*, 193), does not appear to be a case in which the cause of action arose in this city, and does not, therefore, control.

Motion denied, with ten dollars costs to abide event of action.

Moulton agt. Beecher.

SUPREME COURT.

FRANCIS D. MOULTON agt. HENRY WARD BEECHER.

Extra allowance.

A demurrer to a complaint is the interposition of a defense, and is sufficient within the meaning of section 809 of the Code to entitle a defendant in a proper case to an extra allowance.

The motion for an extra allowance in this case was pending when the bill of costs was served, and defendant's attorney insisted that the costs, if to be paid, would be received only on condition that the pending motion for an extra allowance should not be prejudiced. Plaintiff's attorney thereupon tendered the same unconditionally, and left the amount on the table in the office of defendant's attorney:

Held, that there had not been such a final adjustment of costs as to preclude the motion for an extra allowance (*Affirming S. C. at Special Term, 52 How., 230*).

First Department, General Term, May, 1877.

APPEAL from order of special term, granting additional allowance.

This action was brought for malicious prosecution. The defendant demurred to the complaint. This demurrer was sustained at special term. On appeal to the general term, the order sustaining the demurrer was reversed and leave was given to the defendant to answer. The defendant thereupon answered the complaint, and upon the issue thus joined moved at special term, in Kings county, for an order changing the place of trial, which was laid in the complaint in the county of Kings. While that motion was pending and before its decision, the plaintiff amended his complaint by changing the place of trial stated therein from Kings county to the city

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and county of New York. The special term of Kings county thereupon ordered the motion to change the place of trial to be heard in the city and county of New York, where the same was afterwards heard, and an order was subsequently made changing the place of trial to the county of Delaware. The plaintiff thereupon obtained an *ex parte* order at general term in Kings county ordering that the action be discontinued on payment by plaintiff of defendant's costs, to be taxed, and served a copy thereof, with notice requesting the defendant's attorney to procure the costs therein to be taxed, and offering to pay the taxable costs pursuant to the order of discontinuance. After the service of this order and notice, defendant served an amended answer, which was returned by the plaintiff's attorney, on the ground that the action had been discontinued. The defendant gave notice of this motion for an additional allowance of costs, and served a bill of costs, with notice of taxation of the same by the clerk. The amount of this bill of costs was immediately offered by the plaintiff's attorney to the defendant's attorney, who refused to receive the same except without prejudice to the pending motion for an extra allowance. The plaintiff's attorney thereupon tendered the same unconditionally, and left the amount on the table in the office of defendant's attorney. The motion for an additional allowance was heard at special term, and the sum of \$250 was granted.

Roger A. Pryor, for appellant.

Thomas G. Shearman, for respondent.

DAVIS, P. J. — The court concurs with the court below that there had not been such a final adjustment of costs as to preclude the motion for an additional allowance, and is also of the opinion that it is a proper case for an extra allowance. The case had been at issue twice, once by demurrer, and that issue had been displaced by the decision of the general term,

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and the service of the answer allowed by such decision. The service of the answer made an issue of fact, and upon that issue the motion to change the place of trial was made and granted. If that issue was destroyed by the service of a complaint amended merely as to the place of trial, nevertheless the fact that the issue had existed in the case and been made the basis by the court of the order changing the place of trial is not taken out of the case. It is not necessary to decide whether the service of the answer to the amended complaint before the notice of this motion, and before the payment of costs, under the order of discontinuance, was a joinder of issue in the case. There had already been issues, we think, sufficient to be the basis of the motion for an extra allowance under section 309 of the Code. In this case a defense had been interposed within the meaning of the Code, and the case is shown to have been a difficult and extraordinary one.

Order affirmed, with costs.

BRADY and DANIELS, JJ., concurred.

McElwee agt. Sandford.

N. Y. COMMON PLEAS.

SAMUEL McELWEE agt. HENRY S. SANDFORD.

Mechanic's lien — what notice must contain.

In order to perfect a lien under the mechanic's lien law, the claim or notice filed with the county clerk must contain certain statements, the truth of which must be *positively* sworn to by a person acquainted with the fact. Among these statements is that relating to the ownership of the premises.

In an action to foreclose a mechanic's lien under the act, chapter 379, Laws of 1875, the claimant's notice stated that James Meehan was owner. In his complaint he averred that James Meehan was not the owner, but that Elizabeth Meehan was, and that her name was erroneously omitted by mistake, and the name of James Meehan was inserted because he was informed and believed that James Meehan was owner. *Held*, that the notice of lien was defective and formed no basis for the action; James Meehan being the *reputed owner* merely, the notice of lien should have so stated.

Special Term, May, 1877.

DEMURREE to the complaint, in an action to foreclose a mechanic's lien under the act chapter 379, Laws of 1875.

J. F. DALY, J. — The complaint is defective, as it sets forth an insufficient notice of claim filed pursuant to section 5 of the act. The complaint avers that the owner of the premises is Elizabeth Meehan. The notice of claim sets forth that the "labor was performed and materials furnished for the said Henry S. Sanford, the contractor, at the instance of James Meehan, the owner," and also that the "buildings are owned by James Meehan." The verification of the notice of claim is that the claimant "has read the notice and knows the con-

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tents thereof, and that the same is true to his own knowledge." The complaint avers that the name of James Meehan was inserted in the notice of lien, because plaintiff supposed him to be the owner; that he was not aware that Elizabeth Meehan was the owner; that he was informed and verily believed that one James Meehan was the owner, and supposed and understood that James Meehan was the owner; that the name of the real owner was erroneously omitted to be inserted by mistake of the fact. The statute requires that the name of "the owner or reputed owner, if known, shall be contained in the notice of claim." This notice professed to give the name of the owner, and the claimant professed to know it. His positive verification of the notice leaves no doubt that he intended James Meehan as owner, and not as reputed owner. Owing to the nature of the verification required by the statute, *i. e.*, "that the statements contained in the claim are true to the knowledge of the person making the same" — the qualification in respect of the name of the owner — that is, that the person named is the "reputed owner," or, where the name of the owner is omitted, that the owner "is not known," must be specifically stated in the notice of claim; for, by requiring a positive verification of the truth of the matters set forth in the notice by a person having knowledge of the facts, the intention of the legislature that the notice should set forth the facts is evident. In order to perfect a lien under the act, the claim or notice filed with the county clerk must contain certain statements, the truth of which must be positively sworn to by a person acquainted with the fact. Among these statements is that relating to the ownership of the premises. If the person verifying the notice knows the name of the owner, that name must be inserted; if he only knows of a person reputed to be the owner, the name of such person, with the fact that he is so reputed to be the owner, must be inserted; if he does not know the name of the owner or of the reputed owner, he may so state. One of these three statements must be made

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to comply with the act. In this case, the claimant's notice states that James Meehan is owner; in his complaint he now avers that James Meehan is not the owner; that Elizabeth Meehan is owner, and that her name was erroneously omitted by mistake, and the name of James Meehan was inserted because he was informed and believed that James Meehan was owner.

It therefore appears that James Meehan was the reputed owner merely, and that the notice of lien did not so state. It should have so stated and is defective, and forms no basis for the action" (See *Diossy* agt. *Martin*, *N. Y. Com. Pleas*, May 17, 1876, *Daily Register*).

Demurrer sustained, with leave to plaintiff to amend complaint in twenty days, on paying ten dollars costs awarded on this demurrer.

Buess agt. Koch.

SUPREME COURT.

GEORGE BUSS, respondent, agt. GEORGE KOCH, appellant.

Demurrer to complaint—Specific performance—Contract—Breach—Tender, when excused.

The complaint set out an agreement or contract in writing for the delivery of a deed of land and the payment of the consideration on or before May 1, 1875. It was also averred that before that day the party whose duty it was to deliver the deed applied to the party who was to pay the consideration, to name a time and place for performance, to which such party did not reply. It is also alleged that he subsequently executed a deed, in due form, and made all reasonable efforts to find and communicate with the other party to complete the agreement, but which efforts, through the acts and omissions of the other party, were unavailing:

Held, that the complaint, although it failed to show a strict performance of the agreement by the plaintiff, alleged such a state of facts as directly tended to excuse it, and which entitled him to have the agreement specifically performed.

The omission of the plaintiff to have the deed executed on or before the 1st of May, 1875, and tendered on that day at defendant's residence, was equitably excused by the other acts performed by him. A formal tender was waived by the acts and omissions of the defendant.

The fact that all the relief which may be essential to such an action has not been claimed, does not render the complaint so defective as to make it the subject of a demurrer. To avoid that consequence it is sufficient that the facts constituting an equitable cause of action have been alleged and that the relief insisted upon is appropriate *too*, while it may not be all that will be required for a complete or perfect judgment (*Affirming S. C.*, 52 *How.*, 479).

First Department, General Term, March, 1877.

APPEAL from an order overruling a demurrer to the complaint.

Buess agt. Koch.

M. L. Townsend, for appellant.

Kaufman, Tunstall & Wagner, for respondent.

DANIELS, *J.* — The complaint set out an agreement made by the parties on the 1st day of March, 1870. It contained a recital that the defendant had entered into an agreement with George Traeger, by which he had become bound to purchase certain premises on Rivington street, in the city of New York, for the sum of \$15,000, and at his request the plaintiff had consented to take his place and perform his covenants with Traeger, and had further agreed to alter the building upon the land into a shop suitable for carrying on the cabinet-making business, and lease the premises to the defendant for five years, from the first day of the following month of May, and then to convey them to him. The premises were then, by the terms of the agreement, leased and demised to the defendant for such term of five years, at the yearly rent, payable quarterly, of ten per cent on their cost, and the expenses of their alteration.

It was then covenanted that, on or before the expiration of the term of five years, the defendant would well and truly pay to the plaintiff "the said consideration of \$15,000, and also the cost and expense of altering the building as aforesaid, upon the said Buess executing to him a good and sufficient deed of the said premises, free from all incumbrances, which deed shall contain a general warranty, and the usual full covenants." The plaintiff averred that he altered the building and rendered it suitable for the business to which it was to be adapted; that the defendant occupied it and paid the rent up to the 1st of May, 1875. It was also averred that before that day he gave the defendant a notice in writing requesting information from him as to the time when he would be ready to complete the agreement. To that no reply was made. The plaintiff, after the 1st of May, 1875, executed a deed of the premises to the defendant, and went to his residence to

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deliver it and receive the payment agreed to be made, but he failed to find the defendant. Efforts were afterwards made by his attorneys to find the defendant for the same purpose, but they proved to be ineffectual. The plaintiff also averred that on the 1st of May, 1875, and ever since then, he had been ready and willing to execute and deliver the deed in conformity to the terms of the agreement. That the alteration of the building rendered it unfit for other uses without further changes, requiring great expense. The expenses of the alterations made amounted to the sum of \$11,666.04; and for that sum, with the purchase-price to be paid for the property according to the terms of the agreement, the plaintiff demanded judgment.

The defendant demurred to the complaint because it did not contain facts sufficient to constitute a cause of action; and as the money was only to be paid upon the execution of the deed by the plaintiff on or before the day for that purpose mentioned in the agreement—and it appeared that had not been done—he may not have been entitled to what may be denominated a legal relief. But he was not bound to confine his case to relief of that nature, and the facts set out in the complaint did not restrict him to it.

The complaint failed to show a strict performance of the agreement by the plaintiff, but it alleged such a state of facts as directly tended to excuse it, and which entitled him to have the agreement specifically performed. He had so far performed himself as to make the alterations in the building and give the defendant possession; and he endeavored to fulfill the residue of the covenants to be performed by him by securing an understanding which should designate the time when that might be done. That proved ineffectual by the defendant's failure to respond; and then the deed was executed and the defendant sought for in order to complete the agreements, but all reasonable efforts made to find him proved to be fruitless, and then this action was commenced. If the plaintiff was in default, as strictly he probably was at law,

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because he omitted to have the deed executed on or before the first of May, and tendered on that day at the defendant's residence, it was equitably excused by the other acts performed by him. For that reason a court of equity would not defeat his claim to relief because he too confidently relied upon the expectation that the defendant would meet him, and in good faith co-operate with him in performing the covenants which were to be mutually observed, according to the terms of their agreement. His conduct in failing to do so was inequitable, and he ought not to be allowed to shield himself by means of it against the just demand made by the plaintiff, that he should take the property on the terms he had stipulated to perform it for (1 *Story's Eq. Jur.* [9th ed.], secs. 775, 776; *Stevenson agt. Maxwell*, 2 *Cow.*, 409; *Moore agt. Smelburgh*, 8 *Paige*, 601; *Slaird agt. Smith*, 49 *N. Y.*, 619; *Freeson agt. Bissell*, 63 *id.*, 168). It also appeared that the defendant has had the use and occupancy of the property, and as it has not been alleged that he surrendered its possession when his term expired as a tenant, it may be presumed as he was to have the property afterwards as its owner, that he still continues to hold it, and for that reason also he cannot properly complain of the omission to execute and deliver the deed on or before the first day of May (*Viele agt. Troy and Boston R. R. Co.*, 20 *N. Y.*, 184).

The prayer for judgment is entirely consistent with the character already attributed to the action. It demands the recovery of the purchase-price of the property and the amount of the expenses incurred in altering the building; and that the facts alleged show the plaintiff equitably entitled to recover. If a specific performance shall be decreed, the plaintiff will be entitled to a judgment for the payment of the money the defendant covenanted he should receive, and nothing more nor less than that has been demanded. The fact that all the relief which may be essential to such an action has not been claimed, does not render the complaint so defective as to make it the subject of a demurrer. To avoid that

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consequence it is sufficient that the facts constituting an equitable cause of action have been alleged, and that the relief insisted upon is appropriate, too, while it may not be all that will be required for a complete or perfect judgment (*Hall agt. Omaha Nat. Bank*, 49 *N. Y.*, 626, 631, 632). It is all that the plaintiff can require as the equivalent for the deed he has at all times been ready and willing to execute and deliver by way of performing the agreement he has made.

The order appealed from was right and it should be affirmed, with costs, and the defendant should have liberty to answer in the usual time and upon the ordinary terms.

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SUPREME COURT.

JULIA A. BABCOCK agt. JEPHTHA W. BABCOCK *et al.**Fraudulent conveyance by one, with intent to defraud intended wife of dower — wife's remedy.*

On the 14th of August, 1873, the plaintiff, who was a widow, and one Jephtha W. Babcock, a widower, contracted a mutual agreement to marry. At this time each owned and possessed real and personal estates of about equal amounts and value. Both had children of former marriages, of adult age. On the eighteenth of August Jephtha W. conveyed by deed certain real estate to his son and daughter. The said deeds were voluntary on the part of the grantor, no consideration having been paid or agreed to be paid therefor by the grantees. On the twenty-first day of the same August the plaintiff and Jephtha W. did intermarry, in pursuance of their agreement so to do. The plaintiff at the time of the marriage had no information that her husband had conveyed all his real estate to his children. After the marriage, the plaintiff, upon learning that said conveyances had been made, brought this action for the purpose of having the same set aside:

Held, that plaintiff should have judgment declaring said deeds void as to her, and that she has an inchoate dower right in all said real estate, notwithstanding said deeds, and a future absolute right of dower therein upon the event of the death of her husband in her lifetime.

Held, further, that the wife is not required to wait before bringing her action until her inchoate right becomes absolute by the death of her husband. It is the present injury the plaintiff has sustained, in the loss of her inchoate right in the lands in question, that entitles her to maintain her present action.

Where conveyances were made on the eve of the marriage to defraud the wife of the interest in the land which she would have acquired by the marriage, a court of equity will entertain her action for the conservation of the right which she has lost or may lose by the fraudulent acts of the defendants, and grant her such relief as she may be equitably entitled to.

Niagara Special Term, June, 1876.

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ON the 14th day of August, 1873, the plaintiff and the defendant Jephtha W. Babcock contracted a mutual engagement to marry; it was understood by both at that time that their contemplated marriage should take place in a few days thereafter. At this time both parties were residents of the city of Lockport, in this state, and each owned and possessed real and personal estates of about equal amounts and value. The plaintiff was at that time a widow, upwards of sixty years of age, and the defendant, Jephtha W. Babcock, a widower sixty-seven years of age; both had children of former marriages, of adult age. The defendant Isaac H. is the son, and Sarah Elizabeth Balliett is the daughter, of the defendant Jephtha W., and his only children. Jephtha W., at the time of his engagement to marry, was seized in fee of a lot upon which was a dwelling-house occupied by him, in Ontario street, and also other real estate on Niagara street, in the city of Lockport. This real estate was worth from \$12,000 to \$15,000, and it was all the real estate owned by him.

In addition to this, he had personal estate amounting to a few thousand dollars. At the time the marriage agreement was made, the plaintiff had knowledge of what property her intended husband possessed.

On the eighteenth day of the same month, Jephtha W. conveyed by his deed the house and lot on Ontario street to his daughter, the defendant Sarah E., and at the same time he conveyed the Niagara street property to Isaac H., his son, and Sarah E., his daughter, reserving to himself a life estate in all said property. Both said deeds were duly acknowledged and delivered on that day, but were not put upon record until the fourth day of April following. The grantees in said deeds had knowledge, at the time such conveyances were made and accepted, that the grantor and the plaintiff had contracted to marry, and were intending to marry in a short time thereafter. That said deeds were voluntary on the part of the grantor; no consideration having been paid or agreed to be paid therefor by the grantees. That, on the

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twenty-first day of the same August, the plaintiff and Jephtha W. did intermarry, in pursuance of their agreement so to do. The plaintiff, at the time of the marriage, had no information that her husband had conveyed all his real estate to his children, and she now brings this action to obtain the judgment of the court, declaring said deeds void as to her, and that she has an inchoate dower right in all said real estate, notwithstanding said deeds, and a future absolute right of dower therein upon the event of the death of her husband in her lifetime.

L. F. & G. W. Bowen, for plaintiff.

Ellsworth, Potter & Brundage, for defendants.

HENDERSON, J. — At the time the plaintiff and her husband contracted to marry, he, the intended husband, was seized of an estate of inheritance in the land which he conveyed to his children a few days thereafter. Had he continued seized until the marriage, the plaintiff would, by virtue of the marriage and the seizin of her husband, have acquired an inchoate right of dower in all of said lands.

It is alleged by the plaintiff that these deeds were executed and delivered on the eve of the contemplated marriage, without consideration, and for the sole purpose, and with the intent on the part of the grantor and the grantees in the deeds, of defeating the plaintiff's dower right in the real estate of the grantor.

That the only object and purpose of the conveyances was to prevent the plaintiff's inchoate dower right attaching to these lands. This I do not understand the defendants to controvert. But the defendants insist: First, that these conveyances were made to carry into effect a mutual understanding had by the plaintiff and the grantor in the deeds, her then intended husband, that the plaintiff should have no part of or interest in his property by reason of the marriage; that the

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marriage should not in any way incumber his property; that his children should have all his property at his death, and that the plaintiff's children should have all her property at her decease; and that neither should have any interest in the property of the other by reason of the marriage; and the plaintiff is now in no situation to complain that her intended husband took the precaution, by the execution of these deeds, to have their mutual intentions carried out.

If this position is supported by the evidence, then the plaintiff can have no relief; this mutual agreement, if it existed, would not have operated to deprive the plaintiff of her inchoate dower interest in the land, had the husband remained seized to the time of the marriage; but if his alienation of the land prior to the marriage was with her consent or was a means adopted by the husband of carrying into effect a mutual agreement had with the plaintiff, the plaintiff cannot be said to have been defrauded thereby. In support of this position the husband testifies that during the time the subject of the marriage was being discussed, his property was talked about on several occasions; the last one was at the time when the agreement to marry was finally made; and upon these occasions he says he stated to the plaintiff that he objected to marrying on the ground that he did not want to encumber his property by marriage; that he had property to the amount of about \$25,000 and that he wanted it understood that in case they married, his property should go to his children and her property should go to hers; that she replied to these statements, that she had about \$20,000 in property, and that it would be very wrong for her to take any of his property away from his children; that she wanted her children to have hers and his children to have his; that this was the purport of their conversation on this subject at the time the agreement to marry was made, and on more than one occasion prior to that time, when the question of marriage was being considered by them.

The plaintiff denies having these conversations or any con-

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versations about property, previous to the marriage, except that her husband inquired of her some few days before the agreement to marry, how much she was worth, and she told him she was worth \$18,000 or \$19,000, and he replied that he had an income from \$25,000. I am led to the conclusion, from all the evidence in the case, that there was no understanding that either was to forego any legal rights or claims to the other's property, that might arise by reason of the marriage. The circumstances under which these deeds were executed, the fact of their execution being concealed from the plaintiff and kept secret for some months until trouble arose between them, which resulted in their separation, there being no consultation between the plaintiff and her intended husband as to the time and means of effecting what is now claimed they both intended, with other facts about which there is little dispute, leads me to the conclusion that the husband, in thus disposing of all his real estate, thereby placing himself in a situation to deprive his wife of her dower therein, in case she survived him, was acting contrary to what he then believed was right and just towards his intended wife, and that he did not act in good faith, and that he had no reason to believe that his wife would have assented to these conveyances, had she been aware of their existence, but rather, that he intended, by means of these conveyances, to have it in his power, against her will, to take undue advantage of her if occasion should arise when he should desire to do so.

Second. It is insisted that the statute awards dower to the widow, not to the wife, and that during the life of the husband the wife has no such interest in his lands as the law will protect. All elementary writers, treating of dower, speak of it as an inchoate initiate right, given to the wife by the marriage and seizin of her husband during coverture. The death of the husband does not give this right. Upon the death of the husband, the wife surviving, she becomes entitled to possess that which she acquired by the marriage and seizin of her husband.

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This inchoate right of the wife in the lands, of which the husband is seized during coverture, is such a subsisting right as the law protects. In *Simon agt. Canaday* (53 *N. Y.*, 298) it is said by the court that the inchoate right of dower is a valuable right, and will be guarded and preserved to the wife by the judgments of the courts. In *Mills agt. Van Voorhies* (20 *N. Y.*, 412, 420) it is said by the court that the inchoate rights of the wife are as much entitled to protection as the vested rights of the widow. Many other cases might be cited holding that this inchoate right is not beyond the protection of the law.

Third. It is further urged by the learned counsel for the defendants that if the plaintiff had a cause of action it accrued upon the execution and delivery of the deeds by Jephtha W., of the lands in question, and insists that the agreement to marry gave her no interest whatever in her intended husband's real estate. That dower is given by the statute and the plaintiff is entitled to no greater rights than the statute gives her; and the husband not having been seized of an estate of inheritance during the marriage, the wife has acquired no interest, inchoate or otherwise, and she cannot be said to be defrauded of that to which she never had any right or claim whatever.

I think the counsel's argument does not meet the real question presented. The parties not only agreed to marry but they did actually marry, in pursuance of the agreement, and the question now presented is (assuming that the conveyances were made on the eve of the marriage to defraud the wife of the interest in the land which she would have acquired by the marriage), will a court of equity entertain her action for the conservation of the right which she has lost, or may lose, by the fraudulent acts of the defendants, and grant her such relief as she may be equitably entitled to. Had the husband died after the marriage, leaving the plaintiff surviving, the title to the lands remaining in his grantees, could the plaintiff have recovered her dower in these lands in a court of

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equity? I thing the courts have answered this question in the affirmative.

Swaine agt. *Perine* (5 *Johns. Ch. R.*, 482) was a bill in equity for dower. The answer alleged that the husband was not seized during coverture. It appeared in proof that the husband, on the day of the marriage, deeded the premises to his daughter without consideration. The deed was kept secret from his wife. The deed was held by the chancellor to be fraudulent and void as against the plaintiff's claim for dower. In *Reeves' Domestic Relations* (page 103, n), it is said: "A conveyance by the husband just before marriage for the mere purpose of defeating dower, does not defeat it" (*Cranson* agt. *Cranson*, 4 *Mich.*, 230).

If the husband aliens the land on the day of the marriage • the wife will still be entitled to dower; and if before the marriage, but in contemplation of it, he should make a fraudulent conveyance, whether absolute or in mortgage, for the purpose of defeating the right of dower, it will be no bar to her right (*Greenl. Cruise on Real Prop.*, vol. 1, page 172, and cases there cited).

By the statutes of Vermont the widow has dower in the lands of which the husband dies seized. In the case of *Thayer* agt. *Thayer* (14 *Vt. R.*, 107) the facts were as follows: The husband, during his last sickness and in expectation of death, conveyed all his real estate to his children by a former marriage. There was no consideration for the conveyance but that of natural love and affection, and it was made to defeat the wife of her dower.

The question was, whether such conveyance operated to defeat the wife of her dower? The chancellor decided that such conveyance was void as against the wife, and set aside the deed. The case was taken to the supreme court and BENNETT, J., in delivering the opinion of the court, held that the wife had, in the lifetime of her husband, such rights as should be recognized, protected and enforced in a court of equity. That the attempt to elude those rights in the man-

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ner disclosed was *mala fide* and a fraud upon the law and the marital rights of the wife; that the husband, as far as respects the widow, must be regarded, at the time of his death, as having the seizin of the land in question. When the wife is sought to be divested of an equitable right, it must be done in good faith and without the least appearance of deceit.

In a court of law for dower the court require that the seizin of the husband should be established, and will not look beyond the actual conveyance made by the husband to see whether it was made to defraud the wife of dower in his estate; but equity looks upon the transaction in a different light, and when the rights of purchasers in good faith are not involved holds the fraudulent conveyance as a nullity as to the wife's claim to dower, and would, of course, set it aside upon a proper application (*Willard's Eq. Jur.*, 696).

From the examination I have been able to make I have no doubt of the plaintiff's right to dower in the lands in question, in the event she survives her husband, the rights of *bona fide* purchasers not intervening.

I am of the opinion that the plaintiff is not required to wait before bringing her action until her inchoate right becomes absolute by the death of her husband. As we have seen, the inchoate dower right is protected by the law.

It is that right of which the plaintiff is sought to be deprived by the acts of the defendants, and this action is brought to maintain and protect that right. There would be no reason nor justice in compelling the plaintiff to wait before bringing her action until the event of her inchoate dower right becoming absolute. In the meantime the rights of *bona fide* purchasers from the fraudulent grantees of the husband may intervene and defeat the action altogether.

It is the present injury the plaintiff has sustained in the loss of her inchoate right in the lands in question that entitles her to maintain her present action. The plaintiff must have judgment for the relief demanded, with costs.

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N. Y. COMMON PLEAS.

HENRY CASSIDY agt. WILLIAM LEETCH.

Foreign judgment on service of process at defendant's domicile in defendant's absence — Manner of serving process regulated by every country for itself — Answer.

Action brought upon a Louisiana judgment obtained in 1869 upon an attachment of defendant's real property, the "citation," *i. e.*, summons, having been served at the defendant's domicile in defendant's absence. The answer here set up: First. A general denial of the judgment (on information and belief). Second. Lack of personal service of process on defendant. Third. That defendant never appeared in person or by attorney in the Louisiana action, nor litigated nor defended the same either in person or by attorney, nor did he have any knowledge of the Louisiana suit until long after the judgment. Fourth. *Nihil debet.*

Held, that the answer, as a plea in bar, is fatally defective. In order to make the answer sufficient, there should have been added to it allegations showing that the defendant was not domiciled in Louisiana or subject to the laws of that state, or that the judgment is not binding there, or that it is contrary to natural justice.

A foreign judgment rendered against a citizen of the state in which it is pronounced, stands on a very different footing from a foreign judgment against one who owed no allegiance to, and was not subject to the jurisdiction of the state in which it was rendered.

Trial Term, March, 1877.

THE admitted facts as to the citizenship and residence of the parties appear in the opinion. Judgment in the Louisiana action was first taken by default for want of an answer. According to the judgment record (in evidence) an answer was afterwards interposed on behalf of the defendant and the default opened by an attorney and a trial had, or inquest taken, and final judgment rendered for the plaintiff. The

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attorney who appeared for the defendant (one J. U. Coleman) was the husband of the defendant's neice, and in his first deposition in the present suit, taken on behalf of the plaintiff, this attorney contradicted the Louisiana judgment record and testified that he never appeared in that action at all, and was never requested to do so by the defendant. On a supplementary commission, taken to enable him to correct his previous testimony, Coleman testified, that having been shown a paper purporting to be a certified copy of an answer interposed by him in the cause, he now thought that he must have appeared therein, and, further, that he was requested by Mrs. Leetch (the defendant's wife) to examine the notes, or due bills, sued on and see if they were correct, but was not requested by Leetch nor authorized to appear. Later on, in the same supplementary deposition, in answer to a question whether he ever actually appeared in the cause, he says: "I have no recollection of such appearance, and I don't believe I ever did." Defendant testified that he never employed, nor authorized nor knew of the employment of, any attorney in the Louisiana action until long afterwards; that he owed plaintiff nothing and never signed the notes, or due bills sued on in Louisiana.

W. G. Peckham, Jr., for plaintiff.

The judgment record proves that service of the citation was made in accordance with the laws of Louisiana, and in a manner to give the court full jurisdiction to render a general judgment, *in personam*, against the defendant (*La. Code of Practice*, sec. 189 to 190, *inc.*; *Maxwell agt. Collins*, 6 *Robinson* [*La.*], *R.*, 86; *Williams agt. Kimball*, 8 *Martin* [*N. S.*], 352). This attachment was not a proceeding *in rem*. Under such an attachment in Louisiana the plaintiff may obtain a general judgment *in personam* (*Hill agt. Barman*, 14 *La.*, 447). The judgment and *fi. fa.* were general and not *in rem* and directed against all the defendant's property — not merely that attached. The Louisiana court must be presumed to have

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known its powers and to have exercised them properly (*Porter* agt. *Merchants' Bank*, 28 *N. Y.*, 653; *Atkinson* agt. *Taylor*, *U. S. Dist. Ct.* [*Crabbe*], 551). The defendant appeared in Louisiana by a responsible attorney, as appears by the record of judgment, which record he and the attorney cannot here impeach. Defendant has for seven years had a remedy to proceed against the unauthorized attorney or to move the Louisiana courts therein by his proper course (*Field* agt. *Gibbs*, *Peters' Cir. Ct.*, 155; *Brown* agt. *Nichols*, 42 *N. Y.*, 26). Defendant's counsel relies largely upon rulings in this state as to foreign judgments of divorces obtained generally by citizens of this state who temporarily removed elsewhere, and whose divorces thus obtained were afterwards brought in question here. Our courts have certainly held, as to such foreign judgments, that acts thus sought to be done elsewhere, *in fraudum legis* (of our law), cannot later be used as the basis of legal proceeding in this state whose laws were sought to be evaded by its citizens (*See defendant's cases*).

Abbett & Fuller, for defendant.

The courts of this state will not respect this judgment because the citation (that is, summons) was not served upon the defendant *in propria persona*, because the defendant was not represented in the action by an attorney. The attorney's appearance, if he appeared, was unauthorized, and the defendant was in Texas and had no notice of the suit nor opportunity to defend, citing *Kerr* agt. *Kerr* (41 *N. Y.*, 278); *Holmes* agt. *Holmes* (4 *Lansing*, 388); *Phelps* agt. *Baker* (41 *How. Pr.*, 237), and *Thompson* agt. *Whitman* (18 *Wall.*, 457), and other cases.

VAN HOESSEN, *J.*—This action is founded upon a judgment recovered in the state of Louisiana. The Louisiana suit was begun and judgment rendered therein in the year 1869. At the commencement of the suit, and for some time prior, as well as subsequent thereto, the defendant was domiciled at the corner of Rampart and Terpischoe streets, in the

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city of New Orleans. He was absent from home when the suit was begun, and the citation and the petition (papers which correspond to the summons and the complaint of our New York practice) were served upon him by the sheriff leaving a copy of them at the domicile of the defendant, with his (the defendant's) wife, who was a white person above the age of fourteen years, and who dwelt in the same domicile with said defendant.

The return of the sheriff is in strict conformity with the law of Louisiana, as expounded by the courts of that state (*Secs. 189, 190, 201, Code of Practice*; *Kendrick agt. Kendrick, 19 Louis., 38*).

The defendant, as has been said, was domiciled in Louisiana, and owed allegiance to that state and submission to its laws.

The manner of serving process must necessarily be regulated by every country for itself; and if a state permits process to be served upon one of its own citizens by the leaving of it, in his absence, at his domicile with an adult member of his household, that method of service is not so repugnant to the principles of natural justice that a foreign tribunal should refuse to recognize it and treat a sentence founded on it as a nullity (3 *Burge's Foreign and Colonial Law, 1056*).

A foreign judgment rendered against a citizen of the state in which it was pronounced stands on a very different footing from a foreign judgment against one who owed no allegiance to, and was not subject to, the jurisdiction of the state in which it was rendered. The distinction is perfectly well settled.

In the case of *Duflor agt. Burlingham* (34 *Law Times Reports, 688*) the defendant, in an action on a French judgment, pleaded, as the defendant pleads in this suit, that he was not served with process, nor had he notice of the alleged action in France or the opportunity of defending himself according to the rules and practice of the French courts. The plea was held bad by the court of queen's bench, because

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it did not show that the defendant was not a Frenchman, nor domiciled in France.

In *Marbouquet agt. Wise* (1 *Irish Reports* [Common Law Series], p. 471), in an action on a French judgment, the defendant pleaded that he was absent from France at the beginning and during the entire progress of the French suit; that he was never served with a summons, and that he had no notice or knowledge of the suit or any of its proceedings. The court pronounced the plea to be bad because the defendant might have been resident in France or might have had property there, or might, through an agent, have been served with process.

In *Cowan agt. Braidwood* (1 *M. & G.*, 882) the defendant pleaded to an action on a Scotch judgment that he was not within the jurisdiction of the Scotch court at the commencement of the action, nor afterwards. Nor did he know of the proceedings, or any of them, so that he could employ an attorney; nor did he appear. The plea was held bad, TINDAL, Ch. J., saying that the plea ought to have alleged that the defendant was not a resident of Scotland, or that he was not subject to the laws of that country, or that he had no property in Scotland. MANLI, J., said that the defendant ought to have alleged that the Scotch judgment was not binding in Scotland, or that it was against natural justice.

To the same effect is *Vallie agt. Dennergus* (4 *Ex.*, 290). In order to make the answer in this case sufficient, there should be added to it allegations showing that the defendant was not domiciled in Louisiana, or subject to the laws of that state, or that the judgment is not binding there, or that it is contrary to natural justice. As a plea in bar the answer is fatally defective.

It appears affirmatively in this case that the defendant was a resident of Louisiana and the owner of property in that state at the time the Louisiana action was instituted. His family dwelt in New Orleans where the action was brought. It is difficult to see the ground on which the judgment,

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though taken by default, should be held invalid by the courts of this state. It was agreed at the trial that the codes of Louisiana should be received as evidence in the case. Tested by the Code of Practice and the decisions of the Louisiana courts, the service of process was sufficient (*Code of Practice*, secs. 189, 190 and 201; *Kendrick* agt. *Kendrick*, 19 *Louis.*, 38).

The only doubt that can be raised is as to whether a *curator ad hoc* ought not to have been appointed before the default was entered against Leetch. Section 56 of the Civil Code provides, that if a suit be instituted against an absentee who had no known agent in the state, the judge before whom the suit is pending shall appoint a *curator ad hoc* to defend the absentee in the suit.

Leetch was, it appears, an absentee, and if he had not been represented in the suit by an attorney at law the court would, doubtless, have required that a *curator ad hoc* should be appointed. But even if that step had been omitted the court would not, I think, have been ousted of its jurisdiction over the defendant. It is unnecessary, however, to discuss that question, because I am satisfied that the defendant did appear in the Louisiana action and that Mr. Coleman interposed an answer in that suit for the defendant communicated to him through the defendant's wife.

The testimony of the defendant seems to me to amount to nothing more than a denial of any recollection of having employed an attorney in the action.

The authority of the attorney must be presumed until it is disproved (*Hays* agt. *Curry*, 9 *Martin*, 88; *Dangerfield* agt. *Thurston*, 8 *N. S.*, 234; *Curry* agt. *Brenham*, 1 *La. Ann.*, 398).

A mere want of recollection ought not to be permitted to overthrow a presumption founded upon the weightiest consideration of public policy.

The testimony of Coleman tends to show that he was restrained by Mrs. Leetch. The citation was served upon

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her on the 17th day of August, 1869. On the second day of November following the default of the defendant was entered. On the fifth day of November Mr. Coleman appeared in the action, obtained an order setting aside the default and filed his answer. On the seventeenth day of November the plaintiff filed a supplemental petition, and a citation issued upon the supplemental petition was, on the 17th day of November, 1869, served on the daughter of the defendant. On the 20th day of December, 1869, a copy of the judgment was served on the wife of the defendant. Coleman married the niece of Mrs. Leetch. It seems very improbable that he officiously meddled with the suit and appeared without any request to do so. Mrs. Leetch certainly knew of the suit. Two months and a-half elapsed between the service of the citation on Mrs. Leetch and the appearance of Mr. Coleman in the action. Ample time was given to communicate with the defendant, and it is natural to infer that Mrs. Leetch did inform her husband of the commencement of the action. After reading the testimony of the defendant no surprise will be felt at his omission to contest the plaintiff's claim. I think judgment should be rendered in favor of the plaintiff for the sum claimed in the complaint.

Verdict for plaintiff, \$9,107.89.

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SUPREME COURT.

MARY L. JAMIESON agt. DAVID F. JAMIESON.

Divorce—Order of arrest.

An action by a wife against her husband for a limited divorce on the ground of cruel and inhuman treatment comes within the definition of *injuries to the person*, mentioned in section 179 of the Code, and is one in which an order of arrest can properly be granted under the provisions of that section.

First Department, General Term, March, 1877.

APPEAL from an order denying motion to vacate an order of arrest or reduce the amount (\$10,000) of the bail. The parties are husband and wife, and the action is for a limited divorce by reason of alleged cruel and inhuman treatment of the wife by the husband, and the order of arrest was issued upon the complaint and the plaintiff's affidavit. The motion was made on the same papers.

The defendant is a resident of this city, and entirely solvent and responsible, as the plaintiff herself states, and there was no proof that the defendant had disposed of any of his property, or was about to do so, with intent to defraud his creditors, or that he was about to remove from this state.

R. W. Townsend, attorney, and *A. R. Dyett*, of counsel, for appellant.

The order of arrest was unauthorized. The cause of action, though "not arising out of contract," is not "for the recovery of damages," as required by subdivision 1 of section 179 of the Code. If it were, the defendant is neither a

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non-resident of the state, nor "about to remove therefrom," as required by the same subdivision. This is not an action for injury to person or character, or for "injuring or wrongfully taking, detaining or converting property." (*Id.*) Indeed, by the true construction of section 179, the action must be for the recovery of damages in such an action. It should be read: "In an action for the recovery of damages * * * where the action is for an injury to the person or character," &c. Subdivision 3 confirms this construction. This action is for a limited divorce from bed and board, a well-defined and distinct cause of action, under the Revised Statutes. There can be no pretense that the order of arrest can be sustained under subdivisions 2, 3 or 4 of section 179, nor under subdivision 6, as amended by the Laws of 1875, chapter 28, nor yet under subdivision 5. The plaintiff is not a creditor of the defendant. If she were, the disposition of any part of his property, with intent to defraud his creditors, is not alleged, much less is it proved (*Flour City Bank agt. Hall*, 33 *How.*, 1; *Pacific M. Ins. Co. agt. Machado*, 16 *Abb.*, 451; *Moller agt. Aznar*, 11 *Abb.* [*N. S.*], 233; *Wickes agt. Harmon*, 12 *Abb.*, 476). The plaintiff relies on a dictum of judge BACON, in *McIntosh agt. McIntosh* (12 *How. Pr.*, 290), in which he intimates that an action like this may be classed with "injuries with or without force to person and property, or either," under section 167 of the Code, relative to joinder of actions. The question in that case was, whether a cause of action for a limited divorce for cruel and inhuman treatment might be joined with one for an absolute divorce for adultery, and the judge decided that they could not be joined. It was argued that they could be joined, because they might both be classed as "injuries with or without force to the person," under section 167, and the judge gave the intimation just mentioned, at the same time, in the next sentence, saying that the provisions of section 167 were intended to apply to actions known as actions at law, and not to actions of equitable cognizance. The judge was entirely right in

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this, and the actions specified in subdivision 1 of section 179 as actions for "injuries to the person" were also intended to designate what were known as actions at law under that *nomen generale*. We may, however, concede that the decision of judge BACON was correct, but it does not follow that this action falls within the same classification in section 179. Nor can this order of arrest be sustained as a *ne exeat*. It purports to be and is an order of arrest, under section 179 of the Code. A *ne exeat* is a writ, and not an order. The command of a *ne exeat* is to take from the defendant security that he will not go nor attempt to go into parts without the state without leave of the court (*Barb. Chan. Prac.*, vol. 2, p. 519), and the bail bond is to the same effect (*Id.*, 520). The command of this order is in conformity to section 179, and that requires bail to "render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment herein." (*Code*, sec. 187; *Bushnell* agt. *Bushnell*, 15 *Barb.*, 403, 404.) The rights and liabilities of the bail are different. A writ of *ne exeat* cannot be issued unless upon positive proof that the defendant is about to leave the state or threatens to do so, and that thereby the plaintiff is in danger of losing his debt or demand. There is no such proof here; indeed no allegation of any such thing (*Woodward* agt. *Schatzel*, 3 *Johns. Ch.*, 412; *Beames' Ne Exeat*, 25, 33, 34; *Mattocks* agt. *Tremaine*, 3 *Johns. Ch.*, 75; *Bushnell* agt. *Bushnell*, 15 *Barb.*, 399; *Forrest* agt. *Forrest*, 10 *id.*, 46). If the court sustain the order of arrest, the amount in which the defendant is held to bail should be reduced. It is excessive. One thousand dollars we suggest as a proper amount, leaving the court, however, to fix such amount as may be deemed proper. The defendant is a resident of the city, and solvent, and responsible. It is not probable that if the plaintiff succeed she will be allowed alimony to an amount sufficient to call for so large an amount of bail as \$10,000. The order appealed from should be reversed, and the original

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motion granted vacating the order of arrest, or in any event reducing the bail to say \$1,000, with costs, and costs and disbursements of this appeal.

Robert W. Hawkesworth, attorney, and *Rastus S. Ransom*, of counsel, for respondent.

The defendant must be held to admit the truth of all the plaintiff's allegations set out in her papers handed upon her application for the defendant's arrest. This young woman discloses inhumanities and cruelties committed by this defendant which entitle him to the execration of even a barbarian. He takes the broad ground here that it is true he has been the cruel and contemptible wretch that his young wife, after much patient suffering, has been obliged to reveal to the court, but nevertheless he says: "There is no law in an action such as this to secure to my outraged wife my attendance upon the process of this court, although I have been guilty of the most atrocious cruelties and I am liable to my wife for a sufficient sum to support her and her child, still there is no law that can secure that to her. I may go away, and carry all my bonds, etc., in my pocket, and thus leave my wife to live or die. Whether she gets bread is no concern of mine." All this the defendant admits, but under the advice of able and skillful counsel, who has tried to make the law for his client, he seriously contemplates escaping from arrest, although richly deserving imprisonment for a term of years, solely on the ground that there is no law in the state of New York that can be held to authorize an arrest of a defendant in a case for limited divorce. This was the ground taken in the court below, and it is the only ground that can be taken here. Under the old system a husband might have been, and frequently was, arrested in actions for limited divorce by writ of *ne exeat*. The object of that writ was to secure the person of the defendant, that he might be compelled to obey the judgment of the court. The plaintiff in this action demands alimony, and if it should be held that

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the married women's statutes of this state give her no rights or remedies which she did not possess before the passage of those statutes, it is even then clear that she has the right to the order sought to be vacated. Under the old system she might sue her husband in the court of chancery, and having that right she was considered independent of her husband, and she was held to be permitted to enjoy the rights of a party (*Bushnell agt. Bushnell*, 15 Barb., 399; *Denton agt. Denton*, 1 Johns. Ch., 441). In this last case the chancellor held the defendant to bail in \$10,000. Arguing from the principle established by this case, viz., that the wife is a party, and as such entitled to all the rights of a party, it seems very clear that any remedy, provisional or otherwise, which a party plaintiff may have under existing law, shall not be denied to her. It has been held over and over again that the wife may have a writ of *ne exeat*, and these decisions considered and overruled the objection that because the action was by her, as plaintiff, the writ could not issue (*Denton agt. Denton*, *supra*). The writ of *ne exeat* was and still is a provisional remedy. I know of no law since the Code which has taken from the wife any rights or remedies which she had before the Code. On the contrary, she has been, so far as her property and personal rights are concerned, effectually separated from her husband by the enabling acts, and many cases construing those acts sustain my position. My point is this, that if, before the Code, a party plaintiff could have had a provisional remedy, as for instance an order of arrest of the defendant, that even then the wife, in a suit against her husband for a divorce, would be entitled to the same remedy. I conclude, therefore, that even before the enabling acts, under the old system, the wife in a suit against her husband for divorce was clearly entitled to any provisional remedy obtainable by a party under that system. Under section 179 of the Code, subdivision 1, in an action not arising out of contract, where the action is for an injury to the person or character, the defendant may be arrested. By this statute we

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find a party plaintiff has a remedy created by the statute. Arguing from the proposition as stated in the first point, there can be no doubt about the wife's right to the remedy provided for by this section, in an action for divorce upon the ground of cruel and inhuman treatment, which, as in this case, consists mostly of injuries to her person, to wit, assaults and batteries. The wife has now the right to sue her husband in an action at law for an injury to her property (*Whitney agt. Whitney*, 49 *Barb.*, 322). Before the Code she might have maintained a suit in equity against him for the protection of her property and to sustain him from its improper use or destruction (*Freethy agt. Freethy*, 42 *Barb.*, 641). And she had her right of action in equity against him for injuries to her person, and on proving such injuries as the plaintiff here alleges she was entitled to her relief, viz.: Separation, support and costs. Now the Code abolished the distinction between actions at law and suits in equity, and abolished all the forms of such actions. There is now but one form of action for the redress of private wrongs (*Code*, secs. 69, 140). Before the Code the wife must have sought her relief in a court of equity. Now she can obtain it by ordinary proceedings according to the practice of the court. Now the wife has only to state the facts which constitute her cause of action and demand the relief she is entitled to (*Code*, sec. 142). If she has the right to sue, it is very clear that under the Code she is entitled to all the remedies any plaintiff would be entitled to. I have no doubt but that she might sue her husband for damages for an assault and battery, and if she proved her allegations of such injuries to her person she could recover. If she could sue and recover, she would be entitled to an order of arrest. As the writ of *ne exeat* has not been abolished, and that will be conceded, I think, the Code has given the wife in such an action as this, where she alleges and proves, as she has done here, the most outrageous, unprovoked, cruel and inhuman assaults and batteries, a new remedy. Her rights have been increased. She has now greater protection

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and can better secure the obedience of her husband to the judgment and decrees of the court. Is it possible that the law furnishes the wife protection to her property, but denies it to her person? Can it be that for blows and bruises received at the hands of a brutal husband she has no relief against him in law, but that for such an outrage upon her horse she might, in an action at law, mulct him in damages. Finally, I submit that the question now under consideration has been regarded by this court, and an eminent judge has given his opinion, that an action for a limited divorce, on the ground of cruel and inhuman treatment, clearly comes within the definition of injuries to the person mentioned in section 179 of the Code. Mr. Wait, in his excellent work on practice, also subscribes to this doctrine (1 *Wait Pr.*, 609; *McIntosh* agt. *McIntosh*, 12 *How.*, 289).

DAVIS, *P. J.* — This is an action, under the statute, brought by the plaintiff against her husband for a separation from bed and board forever. The statute provides that the separation may be decreed for the following, amongst other causes: First, "the cruel and inhuman treatment by the husband of his wife;" and, second, "such conduct on the part of the husband towards his wife as may render it unsafe and improper for her to cohabit with him." The complaint in this action, and the affidavit on which the order of arrest is made, stand undenied, and they establish the most cruel acts of personal injuries and violence often repeated, accompanied by threats against the life of the plaintiff, under such circumstances as make it entirely clear that she is entitled to the relief prayed for, to wit, a permanent separation, and proper provision for the support of herself and infant child.

The only question, therefore, is, whether the action is one in which an order of arrest can properly be made under the provisions of section 179 of the Code? This question depends upon the construction to be given to the first subdivision of that section.

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That subdivision provides for an arrest upon several causes of action. First, in an action for the recovery of damages on a cause of action not arising upon contract, when the defendant is not a resident of the State, or is about to remove therefrom; and, second, where the action is for an injury to person or character, or for injuring or wrongfully taking, detaining or converting property. The action is not within the first of these classes, because it is not an action for the recovery of damages on the cause of action therein described, and to bring it within the second, it is apparent that it must be an action for an "injury to person," because it is clearly not one of either of the other wrongs named in that clause.

If it be an action for injury to person, within the meaning of the other section, there seems to us no difficulty in upholding the order, for in that case the part of section 179 under consideration would be read, for the purposes of this motion, as though it were in the following words: "The defendant may be arrested as hereinafter described * * * where the action is for an injury to person."

In *McIntosh agt. McIntosh* (12 *How.*, 289) the court said, in substance, that an action for a limited divorce on the ground of cruel treatment is an action for an injury to the person; and it was there held that under the provisions of the Code such a cause of action could not be joined with one for divorce on the ground of adultery. This was following *Smith agt. Smith* (4 *Paige*, 92), where the chancellor held that those two causes of action could not be united in a bill in equity.

The right of arrest under section 179 does not depend upon the question whether the action is an equitable or a purely legal one.

Section 2 of the Code defines an action to be an ordinary proceeding in a court of justice by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense; and the word "action," wherever used in the

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Code of Procedure, must be construed with respect to this definition. Within that definition, this is very clearly an action for the redress and prevention of a wrong; and the fact that the remedy is to be pursued in an equitable form of procedure does not change the nature of the action itself, nor does the relief sought have that effect.

The relief in this case must be strictly equitable, but there is nothing inconsistent between that and the fact that the action is for an injury to the person. The cause of action as alleged in the complaint and affidavit, and as required by the statute relating to divorces of this kind, springs out of direct personal injury by the husband of his wife, which must be of such character as to prove cruel and inhuman treatment, or such conduct on his part as to render it unsafe and improper for her to cohabit with him. In this case, upon the facts alleged, the acts of the husband were, in part, criminal assaults and batteries, frequently repeated, and which inflicted serious injuries on the person of the plaintiff.

These injuries gave her the right of action for the remedies which she now pursues, and we think her cause of action may be properly described, in the language of the Code, as one for an injury to the person. If so, the right to arrest the defendant is given by section 179 of the Code, upon showing that the cause of action exists in the manner described in another section of the Code.

Under the former system the plaintiff's remedy must have been pursued by bill in equity, and by showing a state of facts required by the practice in chancery, the plaintiff could have procured the defendant to be arrested and held to bail upon a writ of *ne exeat*. That remedy still exists in such cases, but does not prevent the use of any other provisional remedy given by the Code. Upon careful consideration, we have concluded, contrary to our first impressions, that the order of arrest in this case can lawfully be upheld.

The case, as presented to us, is one in which this remedy should be permitted to be granted, if it can be in any case of

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this character. So far as relates to the motion to reduce the amount of bail, we think there was no error in denying the motion. The plaintiff's property is shown to be entirely personal, consisting of securities of various kinds, and to amount to about \$30,000.

The relief granted to the wife and child, if the facts which we are now to assume to be true are satisfactorily established, may not improperly reach an amount equal to the security required on this arrest.

The order should be affirmed, with ten dollars costs and disbursements.

BRADY and DANIELS, JJ., concur.

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New York Guaranty and Indemnity Co. agt. Gleason *et al.*

N. Y. SUPERIOR COURT.

NEW YORK GUARANTY AND INDEMNITY COMPANY agt. VALENTINE GLEASON *et al.*

Imprisoned debtor — Application for discharge — good cause why should not be granted.

No execution against the body of any party shall issue while there is an execution against his property not returned. The official return of an execution against property, unsatisfied in whole or in part, is a condition precedent to final process against the person.

Where it appears that the applicants were arrested on June 5, 1875, that judgment against them and their co-defendants was entered January 8, 1876, and execution against property was thereupon issued, which is still outstanding; that plaintiff has endeavored to procure the return of such execution by a rule against the late sheriff to whom it was issued, but that the motion was denied on the ground that a warrant of attachment was issued in the action on the 1st of November, 1873 and levied on property that appeared to belong to defendants or some of them; that, prior to the receipt of such warrant by the sheriff, he had levied upon the same property under and by virtue of other warrants of attachment issued against the said defendants or some of them, in actions which are still pending and at issue, but which have not yet been brought to trial; and that until the validity and effect of such prior attachments have been ascertained and determined by the rendition of judgments in such other actions, it cannot be known whether the proceeds of the property attached, or any part thereof, will be applicable to the execution herein.

Held, that such a state of facts is "good cause shown" within the meaning of the statute, why the defendants should not be discharged from custody on account of the plaintiff's neglect to charge him in execution within three months after the entry of judgment.

The mere omission to issue execution against the person within the time limited does not constitute the condition upon which the exercise of the power to discharge an imprisoned debtor from custody depends. To warrant the invocation of such power, or its interposition, there must have been a *negligent* omission to issue such execution. There can be no possibility of *neglecting* to do that which cannot be done.

Special Term, June, 1877.

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APPLICATION by the defendants, judgment debtors, in actual custody under the order of arrest, for their discharge from imprisonment pursuant to section 288 of the Code, on the ground that the plaintiff has neglected to issue execution against the persons of such defendants for more than three months since the entry of judgment.

Arnold Elliott & White, for plaintiff; *R. C. Elliott*, of counsel.

Code, section 288, provides for the execution against the person after the return of an execution against the property unsatisfied, in whole or in part. And the same section provides for the present motion for a discharge, &c., unless good cause to the contrary be shown. Execution against the property must first be returned (*Hutchins agt. Brand*, 5 *Seld.* [9 *N. Y.*], p. 208; *Fake agt. Edgerton*, 3 *Abb. Pr.*, p. 229). It is irregular to issue an execution against the body before the execution against the property is returned (*Hall agt. Ayer*, 19 *How. Pr.*, p. 92). In *Whittaker's Practice* (3d ed., volume 2, page 649), he says there can be no question that in all cases the fact of the issuing and return of a previous execution ought to appear upon the face of the process. The statute (2 *R. S.*, 556, *secs.* 36 and 37 [*Banks' 5th ed.*, vol. 3, pp. 870, 871, *secs.* 38 and 39]) provides, that if defendant is in custody plaintiff shall charge him within three months; or if execution against the property shall have been issued within three months after the return of such execution, and if plaintiff neglect defendant may be discharged, unless good cause to the contrary be shown. And the statute (2 *R. S.*, 364, *secs.* 4 and 5 [*Banks' 5th ed.*, vol. 3, p. 643]) provides (*sec.* 5), "if defendant be imprisoned on execution in another case, or upon process in the same action, &c., an execution may issue against his body without any previous execution against his property." And section 6 provides, that execution against the body or against the property may issue at the same time to sheriffs of

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different counties, but no execution against the body of any party shall issue while there is an execution against his property not returned; nor shall execution against his property issue while execution against his body is unreturned, unless by order of the court. Section 291 of the Code provides that the existing provisions of law not in conflict with that chapter relating to executions, &c. (*chapter 1 of title 9, which relates to executions*), shall apply to the executions prescribed by that chapter. And any provisions in that article not consistent with the provisions of the Code, must give way to the same. The application should be denied.

A. H. Purdy, for defendants; *Vedder Van Dyck*, of counsel.

SANFORD, J. — Separate applications are made, in this case, on behalf of the defendants Valentine Gleason and Andrew L. Roberts, judgment debtors in actual custody, under an order of arrest, for their discharge from imprisonment pursuant to section 288 of the Code, on the ground that the plaintiff has neglected to issue execution against the persons of such defendants for more than three months since the entry of judgment.

Under the provisions of this section, the defendants are not entitled to their discharge, unless (1) there has been *laches* on the part of the plaintiff in not charging them in execution within the specified period; nor even then if (2) "good cause to the contrary be shown." It will be observed that the mere omission to issue execution against the person within the time limited does not constitute the condition upon which the exercise of the power to discharge from custody depends. To warrant the invocation of such power, or its interposition, there must have been a *negligent* omission to issue such execution. The language of the statute is, "if the plaintiff *shall neglect* to enter judgment in the action, within one month *after it is in his power to do so*, or *shall neglect* to

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issue execution against the person of such defendant within three months after the entry of judgment, such defendant may, on his motion, be discharged from custody * * * unless a good cause to the contrary be shown." To neglect and to omit are not synonymous terms. There may be an omission to perform an act or condition which is altogether involuntary and inevitable; but neglect to perform must be either voluntary or inadvertent. To neglect is "to omit by carelessness or design" (*Webster's Dictionary*), not from necessity, and there can, therefore, be no possibility of *neglecting* to do that which cannot be done.

It appears in this case that the applicants were arrested on the 5th of June, 1875; that judgment against them and their co-defendants was entered January 8, 1876, for \$91,015.35. That execution against property was thereupon issued, which is still outstanding; that the plaintiff has endeavored to procure the return of such execution, by a rule against the late sheriff to whom it was issued, but that the motion was denied on the ground that a warrant of attachment was issued in this action, on the 1st November, 1873, and levied on property that appeared to belong to the defendants or some of them; that, prior to the receipt of such warrant by the sheriff, he had levied upon the same property under and by virtue of other warrants of attachments issued against the said defendants or some of them, in actions which are still pending and at issue, but which have not yet been brought to trial; and that, until the validity and effect of such prior attachments have been ascertained and determined by the rendition of judgments in such other actions, it cannot be known whether the proceeds of the property attached, or any part thereof, will be applicable to the execution issued herein.

The section of the Code now under consideration impliedly prohibits the issue of an execution against the person of a judgment debtor, while an execution against his property is outstanding, and authorizes the more stringent remedy, only when the more lenient one has proved ineffective. The

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official return of an execution against property unsatisfied in whole or in part, is thus made a condition precedent to final process against the person.

Of course, the plaintiff has no control over such other actions, and cannot intervene to procure their trial or dismissal. The defendants may bring them on, or may apply for a dismissal thereof for want of prosecution, whenever they see fit.

Under these circumstances, it cannot be claimed that the plaintiff has been guilty of laches in not charging the defendants in execution within three months after the entry of judgment. No neglect can be imputed to the plaintiff in omitting to do that which cannot be done. There can be no default in law where the law prohibited performance (*The People agt. Bartlett*, 3 *Hill*, 571; *People agt. Tubbs*, 37 *N. Y.*, 586).

But the right of the judgment debtor to his discharge, even in case of laches on the part of the plaintiff, is not absolute. In such cases, he "may * * * be discharged from custody by the court, * * * unless good cause to the contrary be shown."

In an analogous case (*Desisles agt. Cline*, 4 *Robt.*, 645), this court, at special term, on a similar application, made under 2 Revised Statutes, 556, sections 36, 37, held plaintiff's ignorance of the fact that defendant had been surrendered by his bail to be "good cause," within the meaning of the statute, against the defendant's discharge from custody by *supersedeas*, on account of the plaintiff's neglect to charge him in execution within three months after such surrender. As it was within the power of the plaintiff so to charge the defendant, and as the defendant was entitled to get the benefit of various relieving acts, the court, in that case, made an alternative order requiring execution to be issued against defendant's person within ten days, or that a *supersedeas* be allowed (*See, also, Minturn agt. Phelps* 3 *J. R.*, 446).

It is urged that, by waiving the attachment issued herein,

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the plaintiff might have enabled the sheriff to return the execution against property, but that, by insisting thereon, the plaintiff became responsible for the delay, and should be estopped from taking advantage of an obstacle interposed by itself. But the exhaustion of the legal remedy against his property, before a resort to final process against his person, seems to have been imposed by the legislature as a condition in the interest of the judgment debtor; and the corresponding right to exhaust such remedy, without prejudice to preliminary process, before issuing final process against the person, must have been intended to be conferred upon the creditor. The object of the statute in allowing a *supersedeas* was, doubtless, to compel an election between the body and the goods of the defendant; but the fact that an exhaustion of the legal remedy against property is a condition precedent to the remedy against the person, seems to be conclusive against requiring such election to be made before the legal remedy against property has been fully exhausted. It cannot be deemed to have been exhausted while the lien of an attachment, to which an execution against property relates, remains unenforced. The existence of such a lien, the inability of the plaintiff to secure its immediate enforcement, and the necessity of its abandonment in order to secure the return of an execution against property, and the consequent right of resort to final process against the person, within three months after the entry of judgment, seem to me to be "good cause" for denying the defendants' motion for their discharge from custody.

Each motion must, therefore, be denied, with ten dollars costs.

Matter of Brady.

COURT OF APPEALS.

IN THE MATTER OF WALTER BRADY.

Imprisoned debtor — Application for discharge — meaning of "just and fair" — what must be shown to prevent discharge — 2 R. S., chap. 5, tit. 1, art. 6, — Appeal.

On an application by an imprisoned debtor for his discharge, under *title 1, chapter 5, article 6 of part 2 of the Revised Statutes*, the discharge will not be granted, where the debtor has been guilty of the acts which he is required to negative by the oath prescribed by the statute; and it is enough to show that the proceedings on the part of the prisoner are not *just and fair*, if the creditor establishes on the hearing that the debtor has disposed of, or made over, any part of his property with intent to injure or defraud any of his creditors, although such acts were committed before the commencement of the action in which he is imprisoned, provided they are shown, also, to be so far connected with the action as to be the grounds upon which the order for his imprisonment therein was based. (*Per* EARL, J.; FOLGER, RAPALLO and ANDREWS, JJ., *concurring*.)

The provisions of the act, which in effect forbid such discharge, if the debtor has fraudulently disposed of his property, or in case his *proceedings* have not been *just and fair*, contain no limitation as to *time*, and it is immaterial whether a fraud upon his creditors is perpetrated before his imprisonment in execution, or intermediate the arrest and examination. (*Per* EARL, J.; FOLGER, RAPALLO and ANDREWS, JJ., *concurring*.)

An appeal lies to the general term of the supreme court, from an order of the special term, discharging a petitioner from imprisonment on execution. It is a special proceeding, as defined by sections 1, 2 and 3 of the Code, but such order is not final and conclusive in the sense that it cannot be appealed from. (*Per* EARL, J.; FOLGER, RAPALLO and ANDREWS, JJ., *concurring*; ALLEN and MILLER, JJ., *dissenting*.)

May Term, 1877.

THIS is an appeal by the petitioner, Walter Brady, from an order of the general term of the supreme court of the first department, reversing an order of the special term, entered

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in a proceeding under title 1, chapter 5, article 6 of part 2 of the Revised Statutes, discharging the petitioner from imprisonment on execution, and denying the applicant's petition for a discharge.

The petitioner was arrested in the two actions brought by the opposing judgment creditors for disposing of his property with intent to defraud his creditors.

Motions were made in each of said actions to vacate said orders of arrest, and denied, and in one of them an appeal was taken from such order of denial to the general term of the supreme court, and the order so appealed from was affirmed (*Wheeler agt. Brady, 2 Hun, 347*).

Judgment was subsequently entered and execution duly issued against the petitioner's person, on which he gave bail for the limits, in each of said actions; subsequently the petitioner brought these proceedings pursuant to the above title of the Revised Statutes for his discharge.

On the return day, the petitioner was put upon the stand by the respondents and examined, and his testimony shows conclusively that after contracting the indebtedness upon which said judgments were recovered, he, being then insolvent, transferred to his unmarried daughter, who resided with and was supported by him, and to his attorney, all his remaining property without consideration (which constituted the grounds for obtaining and holding said orders of arrest), and that two days previous to such transfer, he executed a mortgage for \$5,000 on a portion of his real estate for his own benefit, and without consideration, to a person with whom he had then arranged to go into partnership shortly after.

This was unknown to respondents until so disclosed on the examination, and therefore the orders of arrest were granted and sustained independently of this last fraudulent transfer.

It is admitted, by stipulation made in this proceeding, "that the said petitioner, Walter Brady, was arrested in each of the actions described in his examination herein on *ex parte* affidavits, on the ground that he had disposed of his property

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with intent to defraud his creditors, and that motions were made in each case by him on counter affidavits to vacate the two orders of arrest, which were denied; and that the two judgments from imprisonment, under which the debtor, Walter Brady, has applied to be relieved, are the judgments entered in said two actions in which the orders of arrest were granted and held."

Mr. justice DONOHUE, at special term, held that the petitioner was entitled to his discharge, on the ground that the evidence did not show that he is "now concealing, or attempting to conceal, property," and therefore granted the order of discharge appealed from. The following is judge DONOHUE's opinion at special term :

DONOHUE, J. — After the most careful examination of the case, it does not appear to me that there is any evidence to show that the defendant has in his possession or under his control any property or rights, which he now secretes or has secreted. In contemplation of these proceedings, his assignment carries with it any right he may have to all his property. I fully agree with judge CLERKE, in "*Matter of Latorie*, the law did not intend a perpetual imprisonment." If it appeared that the defendant was now concealing or attempting to conceal property, the imprisonment might continue until he did justice; but it does not appear on this evidence that any further continuance of it can produce any result. I feel myself bound by the case referred to, and order the discharge asked.

On appeal to the general term the order of the special term was reversed and the following opinion rendered :

DAVIS, P. J. — The respondent was imprisoned on two executions issued upon judgments severally recovered by the appellants. He was arrested in each of the actions upon orders obtained upon affidavits alleging that he had disposed of his property with intent to defraud his creditors. Motions in each of the actions to vacate such orders of arrest, founded

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upon affidavits, were made and denied, and an appeal was taken from the order of denial in one of such motions, which order was affirmed by the general term (*Wheeler agt. Brady*, 2 *Hun*, 347). The application for discharge was made under title 1, chapter 5, article 6 of part 2 of the Revised Statutes (2 *Rev. Stat.*, p. 31 [*Edm. ed.*]). The fifth section of the statute under which the proceeding is presented, requires that an affidavit shall be made, indorsed on the petition and sworn to by the applicant, stating that his petition and the account of his estate, and of the charges thereon, are in all respects just and true, and that he has not, at any time or in any manner, disposed of or made over any part of his property with a view to the future benefit of himself or his family, or with an intent to injure or defraud any of his creditors. The eighth section of the same statute declares that, "unless the opposing creditors shall be able to satisfy the court that the proceedings on the part of the prisoner are not just and fair, the court shall order an assignment as aforesaid and grant a discharge as hereinafter directed." The court granted the order of discharge. The grounds upon which it was granted appear by the opinion of the learned judge.

This opinion shows that the order of the court below was granted because the opposing creditors failed to show that the petitioner was at *that* time concealing or attempting to conceal property, or had then in his possession or under his control any property or rights which he then secreted, or had secreted, in contemplation of these proceedings. We think this was altogether too narrow a construction of the statute under which the petition was presented. He was required by the statute to swear that he had not at any time, or in any manner, disposed of or made over any part of his property with a view to the future benefit of himself or his family, or with an intent to injure or defraud any of his creditors (*Sec. 5, ubi sup.*). We think if the opposing creditors succeeded in establishing that this part of the affidavit, indorsed upon

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the petition, was not true, they thereby showed that the proceedings of the prisoner were not just within the meaning of the statute.

Such was the construction of the statute in *Gale* agt. *Clark*, by DALY, Ch. J., of the common pleas, in an opinion reported in the New York Weekly Digest (*vol. 1, No. 10, p. 209*), in which he held that, "by the act, the applicant is required to swear that he has not parted with or made over any part of his property with intent to defraud any of his creditors." And he also held that the act of mortgaging personal property to a brother of the petitioner, before the commencement of the action in which he was imprisoned, with intent to defraud creditors, was a proceeding not just and fair within the meaning of the statute, as construed by the court in the case of *Watson* (*2 E. D. Smith, 429*). It is not reasonable to suppose that the legislature would require an imprisoned debtor to take the oath above set forth and at the same time provide for his discharge, notwithstanding it should be shown by an opposing creditor that such oath was false, because it was not also shown that he had, at the time of the hearing, property which he then concealed, or because it was not shown that he had secreted his property with a view to the particular proceeding for his discharge. The intention was, we think, as indicated by the form of the oath, to prevent the discharge of a debtor who has been guilty of the acts which he is required to negative by the oath prescribed by the statute; and that it is enough to show that the proceedings on the part of the prisoner are not "just and fair," if the creditor establishes on the hearing that the debtor has disposed of or made over any part of his property with intent to injure or defraud any of his creditors, although such acts were committed before the commencement of the action in which he is imprisoned, provided they are shown, also, to be so far connected with the action as to be the grounds upon which the order for his imprisonment therein was based.

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This condition of things was shown by the appellants on the hearing of this case. They produced the affidavits upon which the order was made, and those made upon the hearing of the motion to discharge the orders, which showed the grounds upon which the order was made, to wit, the disposing of the property with intent to defraud creditors; and they proved by the petitioner's own examination that he had made the disposition alleged in those papers of his property, and showed other transactions relating thereto which we think the court below, if it had considered these acts as within the statute, would undoubtedly have held to have been fraudulent as to his creditors.

The order of the court below was therefore erroneous and must be reversed, with costs of the appeal.

DANIELS, J., concurred.

From the order of the general term this appeal is now taken.

Thomas M. North, attorney, and *J. Langdon Ward*, of counsel, for appellants, argued the following points:

I. Judge DONOHUE's decision was correct, and his order should have been affirmed, for the reasons given in his opinion. The application was under 2 Revised Statutes, chapter 5, article 6 (*not under the Stillwell act*). By section 6, the court, "if satisfied that the petition and account of the applicant are correct, and that his proceedings are just and fair, shall order an assignment to be made," &c. By section 8, unless the opposing creditor shall be able to satisfy the court that the proceedings on the part of the prisoner are not just and fair, the court shall order an assignment as aforesaid, and grant a discharge. The issue tried before judge DONOHUE was whether the applicant's petition and account was correct, and his proceedings just and fair. What proceedings? The word is again used in section 13 in unmistakable context: "the proceedings authorized by this article." Such is the natural, grammatical and logical meaning of the word in such

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a connection. Clearly it means the proceedings prescribed by the statute. "The proceedings on the part of the prisoner," his proceedings to obtain a discharge from imprisonment. Such is the only meaning consistent with the apparent plan and policy of the act. It is a remedial statute; it recognizes that the object of imprisoning a debtor is to reach his property; it enables a debtor to be discharged from imprisonment if he will justly and fairly substitute for his person the property which he had at the time of his arrest, except such as he may have justly and fairly used meanwhile. It is not a punitive statute to imprison forever a debtor whose conduct throughout life has not always been just and fair. In *People agt. White* (14 *How. Pr. R.*, at page 501), judge E. D. SMITH gives the correct interpretation of the statute: "The requirement that the proceedings must be just and fair * * * cannot relate to the general dealing and transactions of the applicant before his imprisonment, because, under the non-imprisonment act, and now under the Code, it is a ground of arrest and imprisonment that the defendant fraudulently contracted the debt in question, or has fraudulently concealed or disposed of his property. The very ground on which the original arrest and imprisonment was authorized, as in this case, where the debt was contracted in a fiduciary capacity, cannot present the ground on which the court may adjudge the proceedings of the imprisoned debtor not *just* and *fair*, and refuse his discharge." And see further able and complete exposition of the statute (*pages* 501, 502). See, also, the manuscript opinion of judge CLERKE, *In the Matter of La Torre*. The court of appeals, in *People agt. Bancker* (5 *N. Y.*, 121-124), considered the two inventories, one at the date of imprisonment, and one at the date of the petition, as required for the purpose of showing whether he had, *pending the proceedings*, made any improper disposition of his property, and thus testing the justness and fairness of his proceedings. The supreme court, at general term, fifth district, in *People agt. Brooks* (4 *How.*, p. 165), held that voluntary proceedings in bank-

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ruptcy by an imprisoned debtor, *pending* his imprisonment, whereby his property was vested in an assignee, was a fraud on this statute, and that his discharge should be refused on that ground. The superior court, in *Roswog* agt. *Seymour* (7 *Robt.*, 427), held that a voluntary petition in bankruptcy, whereby the debtor's property was disposed of *before* his arrest, but after his liability to arrest, did not bar his discharge.

This view of the statute is confirmed by the striking difference between its language and that of the Stilwell act (*chapter 300, Laws of 1831*), which, after providing the same machinery of petition, account and inventory, enacts, in section 16, "if at any hearing of such petition, the opposing creditor shall fail to satisfy said officer that the proceedings on the part of the petitioner are not just or fair, *or that he has converted, removed or disposed of any of his property, with intent to defraud his creditors*, such officer shall order an assignment," &c. If this court could amend the Revised Statutes, by adding to sections 6 and 8 the clause above italicized, the appellant's construction of the statute might be sound. But the legislature meant one thing by the requirement in both statutes that the petitioner's proceedings must be just and fair, and quite another thing by the addition in the later statute of the italicized clause, which manifestly was not included in the previous clause within the legislature's intention.

II. If the petitioner had, in fact, conveyed any property in fraud of his creditors before his imprisonment, that property, by virtue of Laws of 1858, chapter 314, passed to his assignee in these proceedings, as well as the property of which he remained in possession, and the objects and intent of the act are fully satisfied by the assignment; it gives the creditors, in substitution and redemption of their debtor's person, every right of property which he had or ought to have had. Why should he be longer imprisoned?

III. If the issue submitted to judge DONOHUE was as broad as the appellants' claim, extending to the justness and fair-

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ness of the petitioner's conduct in all respects and at all times, the evidence would have justified a finding in favor of the respondent, and the general term should not have reversed that finding upon a different view of the evidence.

IV. If this court will examine the testimony, they will affirm the order of judge DONOHUE on the merits, whatever their interpretation of the clause above discussed. 1. There is no evidence, we suppose no claim, that the petition and account are not correct, or that the proceedings on the part of the prisoner, in the sense given those words in the *People* agt. *White (supra)*, are not just and fair. 2. The conveyance to the wife in November, 1871, was before the petitioner's insolvency, before the appellant's claims existed, and when, so far as appears, he was free from unsecured indebtedness. There is no evidence here on which the court could hold that provision for his wife fraudulent. 3. The conveyance to Reed & Thompson, and of the lots on One Hundred and Twelfth street, seem to be, and we suppose are, unobjectionable. The mortgage to Brewster is not shown or suggested to have been in any respect improper. The mortgage to Todd was a fourth mortgage on a valueless equity of redemption. Whatever its object, it was not intended to defraud creditors, and did not, in fact, defraud them. 6. The conveyance to Brewster was also of a valueless equity of redemption, by which creditors have lost nothing. There was a good consideration, for which the conveyance, subject to two mortgages on a part, and four on the rest of the premises, was not likely to be excessive. It turned out to be not adequate. The only criticism justly to be made on this transaction is that the lawyer was pressing for his pay, and the client willing to give him a preference over other creditors. 7. The conveyance to the daughter was of land which he had offered to sell for \$250, which he thought worth \$600 or \$700, though he had never been offered more than \$500, which was subject to heavy arrears of taxes and assessments, in payment of a meritorious indebtedness to her for loans and

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services. He had years before verbally sold and agreed to convey the land to her, and she had long been in possession of the premises, and collected its rents as owner. Pecuniary arrangements between members of a family are apt to be loose and informal, but there is no contradiction of the petitioner's testimony that he had borrowed as much as \$600 from his daughter, which he owed her, with interest, and that she had performed services as housekeeper since her majority, for which he must have paid a stranger \$500. It would be hard to make out a fraud on creditors in a conveyance of land which ultimately realized less than \$1,000, in payment of such a debt. The court will be slow to doom an aged, broken man to perpetual imprisonment for mere inconsiderate looseness, and want of business method in dealing with his own daughter.

V. There was no error in the rulings in appellant's favor. The *ex parte* affidavits offered were not evidence on this trial. They were afterward admitted erroneously. The orders ruled out were afterward admitted erroneously.

VI. The order of arrest, and order denying motion to vacate, are not a bar to this proceeding. To hold them so would deprive this statute of the universal application intended by its policy, and expressed in its opening words, "*Every person who shall be imprisoned*" (*Sec. 1; People agt. White, supra*).

VII. Nor are they conclusive evidence. The issue here is not the same as on those motions, and the burden of proof which was then on Brady now rests on his creditors.

The order of the general term should be reversed, and the order of the court below affirmed, with costs.

George W. Van Slyck and *Freling H. Smith*, counsel for creditors, argued the following points :

I. The order is not appealable. The general term, upon the evidence presented, refused to grant the discharge (*See general term opinion, Tracy agt. Altmeyer, 46 N. Y., 598*). The order denying the discharge involved discretion. Sec-

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tion 6 of the said statute provides "that the court shall order the applicant to be brought before it, * * * *and, if satisfied* that the petition and account of the applicant are correct, and that his proceedings are just and fair, shall order an assignment," &c. This court, in construing the title of the Revised Statutes which relates to the discharge of persons committed for a contempt, held that the statute committed to the tribunals referred to a discretion not subject to review in this court, and that it was for the court below to decide as to what evidence it would require upon such an application (*The People* agt. *Delrecchio*, 18 *N. Y.*, 352). The appeal involves neither the question of want of power nor that of strict legal right (*Tilton* agt. *Beecher*, 59 *N. Y.*, 180).

II. The act forbids such discharge from imprisonment if the debtor has *at any time* fraudulently disposed of his property, or in case his proceedings have *at any time* not been just and fair. It contains no limitation *as to the time* within which such fraudulent disposition may have been made, or within which any of his proceedings may not have been just and fair. It provides (*sec. 5*): "At the time of presenting such petition, the following affidavit shall be indorsed thereon, and shall be sworn to by the applicant: I, the within-named petitioner, do swear * * * that I have not, at any time or in any manner, disposed of or made over any part of my property with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors." The above oath is necessary to, and constitutes a *part of the proceedings* of the petitioner for his discharge. The following section (*sec. 6*) of said act provides as follows: "Upon the presenting of such petition * * * the court shall order the applicant to be brought before it, * * * and if satisfied that the petition and account of the applicant are correct, *and that his proceedings are just and fair*, shall order an assignment," &c. Therefore, as the petitioner's oath constitutes a part of the proceedings, if the court becomes "*satisfied*" that his oath is false in

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any material respect, then the court *cannot* be "*satisfied*" that his *proceedings are just and fair*. The required oath states substantially but two things, viz.: First, that the petition and account are just and true. Second, that the petitioner has not, *at any time* or in any manner, disposed of or made over any part of his property with a view to the future benefit of himself or family, or with an intent to injure or defraud any of his creditors. The second branch of this oath is certainly quite as important as the first, and quite as essential to the interests of creditors, for, if a fraudulent disposition of his property is made by a debtor, of what use is the assignment provided for in the above act? The oath prescribes no qualification or limitation as to the time of the fraudulent disposition. If, therefore, the opposing creditors succeed in satisfying the court that the petitioner "has disposed of or made over a part of his property with a view to the future benefit of himself or family, or with an intent to injure or defraud any of his creditors," then the court must necessarily conclude that the most important and material part of the petitioner's oath is false, and consequently that his proceedings are not just and fair (*Gaul* agt. *Clark*, *N. Y. Weekly Digest*, vol. 1, No. 10, p. 209; *Matter of Paul Andrit*, 2 *Daly*, 28; *Matter of Watson*, 2 *E. D. Smith*, 429; *Maas* agt. *Latorre*, 6 *Abb. Pr. [N. S.]*, 219; *Clark* agt. *Wright*, 10 *Wend.*, 584). If the rule here contended for be subject to any qualification by reason of its broadness, no such modification could equitably extend so far toward the opposite extreme as to effect the exclusion of this case from its operation, especially where the fraudulent dispositions of property by the debtor, and his unjust and unfair proceedings, are so intimately connected with the actions in which these judgments were obtained against him, that they constitute the grounds of his arrest in the said actions, and these grounds of his arrest and the grounds of the present opposition to his discharge are identical. The *People* agt. *White* (14 *How. Pr. Rep.*, 498), cited in the court below by

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appellant's counsel, was an application for a discharge, which was refused, although the ground of arrest was the embezzlement of money received in a fiduciary capacity, it appearing that the applicant had not satisfactorily accounted to the court for the large amount of money he had received and embezzled. The court therein say that the requirement that the proceedings must be "just and fair," must obviously refer to something extrinsic to the formalities of the petition, account, schedule and affidavit, and that the affidavit is the key to the meaning of the words "just and fair." The policy and spirit of the insolvent laws are to discharge debtors from imprisonment on their giving up *honestly* all their property to their creditors; but a debtor who, in contemplation of judgments about to be recovered against him, fraudulently assigns and disposes of his property, cannot be said to have honestly given up his property upon his application to be relieved from imprisonment under such judgments. If any other construction than that claimed by the respondents should prevail, what utility would there be in arresting a debtor? The mere fact of an assignment by the debtor, which may include all his right, title and interest in and to the property fraudulently disposed of, secures no more to the judgment creditor than he can get by a creditor's bill.

III. The petitioner fraudulently disposed of his property in order to defeat the respondents in the collection of their judgments. It appears from the testimony of the petitioner in these proceedings, that on the 8th day of April, 1873, he was, and had been for the preceding twenty years, a large real estate owner in the city of New York, owning at that time fourteen lots in said city, all of which he conveyed prior to the 28th day of January, 1874, and that he is now residing on Fifth avenue, in a house conveyed by him to his wife in 1871. On the 23d day of January, 1874, he still owned six lots, as follows: Two lots on the north-west corner of One Hundred and Thirty-first street and Fifth avenue, subject to mortgages amounting to \$17,000. Three lots on

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the north-east corner of Third avenue and One Hundred and Sixth street, subject to mortgages amounting to \$24,000. One gore lot on the south side of One Hundred and Thirteenth street, between Second and Third avenues, unincumbered, except by taxes and assessments. That on said 24th day of January, 1874, petitioner executed, and on the following day acknowledged, and on the twenty-sixth caused to be recorded, a mortgage on said Fifth avenue lots for \$5,000, to one Reuben J. Todd, with whom petitioner had previously agreed to form a business copartnership, including one Wood, on the following first day of February, to carry on the real estate brokerage business. Petitioner made said mortgage, and recorded it in advance of his said copartnership, as the part of the capital he was to furnish said firm. Said business required no capital, excepting a trifling sum. His copartners agreed to, but in fact never furnished any capital. These lots were worth all the incumbrances, including this mortgage, and more. On the 26th day of January, 1874 (the same day on which above mortgage was recorded, and two days after it was acknowledged, Sunday intervening), petitioner conveyed to George H. Brewster, his attorney and counselor, the said Fifth avenue lots, and also the said Third avenue lots, subject to incumbrance. The property so conveyed was worth, in 1873, \$65,000, and the petitioner had refused that sum for it, and that was the consideration expressed in the deed. The petitioner conveyed this property in payment for past services and for services *to be performed* in the future. The petitioner at one time swears that the conveyance to Brewster was to be absolute, and at another time that it was "*as collateral security* for such indebtedness as was then due, &c., and for such *other indebtedness as might thereafter become due*" from him to Brewster. He swears that at the time of this conveyance he considered the property worth nothing above the incumbrances; yet he thought Brewster might get something out of it, but cannot explain his meaning. He refused \$30,000 for the Fifth

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avenue lots a few months before — \$7,000 more than the incumbrances, including his mortgage to his partner Todd. Brewster rendered no bill. The value of his services and the amount of his charges are unknown, and there is no limit to the future services, and their nature, even, is not fixed. On this same 26th day of January, 1874, the petitioner made a conveyance to his daughter of the gore lot on One Hundred and Thirteenth street, unincumbered. The deed was drawn by Brewster, and recorded with Brewster's deed. Consideration expressed, \$1,500. The actual consideration is claimed to be the sum of \$600, loaned to the petitioner by his daughter Georgiana (who was twenty-three years of age at the time of the conveyance) at intervals in small sums during the previous five or six years (he can't give dates or amounts), and for services of his daughter as housekeeper for himself, wife and family, valued at \$400 or \$500, and interest on the \$600. He boarded and clothed his daughter during all this period; during the greater portion of it she was under twenty-one years of age. He can furnish no basis for determining the amount he borrowed of her, &c. There was no agreement for services; no price fixed; nothing said about a price. He can't tell when he agreed to convey the property to her, and although he says it was agreed that she should have this lot a long time before the conveyance, he swears he deeded it to her in payment for her services *rendered up to the very day* of the conveyance, and even a portion of the \$600 was loaned, he says, only a few months before — within a year of the conveyance — and yet he swears, when examined by his own counsel, that he verbally conveyed the lot to his daughter *three or four* years before, she being then nineteen or twenty years old. At folio 91 he swears it was *one or two* years before. He had owned the lot twenty years; thinks its value was only \$500 or \$600, although immediately after the conveyance to his daughter he sold it for her for \$1,400 cash. She obtained out of it, above all expenses, about \$1,000, from which the petitioner immedi-

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ately began to borrow. He at first swears he did not borrow to exceed twenty dollars, but on being confronted with his daughter's affidavit — used by him on one of the motions to vacate one of the orders of arrest, in which she states she loaned him, after the conveyance, \$300, he is unable to state whether he had \$300 or not, and can't remember one way or the other, &c. The petitioner, during these years in which he was borrowing from his daughter, was giving her money. In his affidavits in the Wheeler case, the petitioner stated the consideration was \$600 borrowed money, and other indebtedness, amounting in all to \$1,300. In the Vandeventer case, he swore it was \$600; and in these proceedings he states it to be \$600, and interest and services worth \$400 or \$500. It will now appear why so many transactions center about the 27th day of January, 1874. On the following day, — January 28, 1874 — an inquest was taken in the supreme court circuit, in the city of New York, in an action against the petitioner, in which Brewster was his attorney; and on the thirtieth a judgment therein was entered against him for \$13,482.51, so that a day or two before said inquest the petitioner had not only mortgaged his property to his then prospective partner for his now benefit, without consideration, for \$5,000, but had transferred all the remaining property he possessed to his daughter and attorney, without consideration.

IV. The petitioner's conduct and motives must be tested and judged by reference to the facts and circumstances as they existed at the time of the transactions in question. It will not avail him to assert that he received no benefit from the fraudulent \$5,000 mortgage or the conveyances. The mortgage, when made, was confessedly good, and the daughter received \$1,000 net cash from the transfer to her. It is immaterial what the lots conveyed to the attorney afterward brought, and particularly eighteen months later, at forced sale, and in times of great financial depression. Such sale is no criterion of value (*Schenck* agt. *Andrews* 57 *N. Y.*, 133, 150).

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V. The order appealed from should be affirmed, or the appeal dismissed, with costs to each of the opposing creditors.

EARL, J. — The debtor was arrested in two actions upon orders of arrests, issued because he had disposed of his property with intent to defraud his creditors. Judgments having been obtained in the actions, he was arrested and imprisoned by virtue of executions issued thereon. He applied for his discharge as an imprisoned debtor, under part 2, chapter 5, title 1, article 6 of the Revised Statutes. By article 6, an imprisoned debtor, desiring a discharge from imprisonment, is required to present a petition to the court praying for his discharge, setting forth the matters specified in section 4. He must swear to the following affidavit, as prescribed in section 5, to be indorsed upon his petition: "I, the within named petitioner, do swear that the within petition and account of my estate, and of the charges thereon, are in all respects just and true; and that I have not, at any time, or in any manner, disposed of or made over any part of my property, with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors." If, upon the hearing, the court shall be satisfied that the petition and account of the applicant are correct, and that his proceedings are just and fair, the discharge must be granted.

The affidavit is part of the proceedings, and that cannot be just and fair unless it is true. It is important, therefore, to ascertain the scope and meaning of the affidavit.

It is not complained in this case that the petition and account of his estate, and of the charges thereon, were not just and true. It was not shown that he had disposed of any of his property with a view to the future benefit of himself or his family. The future benefit here mentioned was a benefit to be received and enjoyed after the date of the petition. An imprisoned debtor could not be discharged who had thus secured for himself the benefit of property which ought to have been, and to be, appropriated to the payment of

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his debts. But the claim is that he had disposed of some of his property with intent to defraud his creditors, and the facts sustain this claim. What creditors are here meant? Plainly creditors who could be defrauded by the disposition complained of. There must have been an intent to defraud existing creditors, of whom the creditor contesting the discharge would be one. A fraud committed years before, upon a class of creditors whose claims had been paid, or had ceased to exist, would not prevent a discharge, and a creditor could not contest the discharge on the ground of a fraudulent disposition of property, who was in no way injured or defrauded. The fraudulent disposition made here was with intent to defraud the very creditors who oppose the discharge.

That this construction of the statute may lead, in some cases, to unlimited imprisonment, is possible. But we have nothing to do but to construe the law and enforce it as it is. We have no power to abrogate it or soften its hard features. At the time of the adoption of this statute imprisonment for debt was authorized in all cases. The honest and dishonest debtors shared the same hard lot. The sole object of this statute was the discharge of honest debtors, who made an honest and full surrender of all their property for their creditors. It was not intended to benefit debtors who had disposed of their property for the purpose of defrauding the very creditors at whose suit they were imprisoned. Even under the non-imprisonment act, passed subsequently, which, in most cases, abolished imprisonment for debt (*chap. 300 of the Laws of 1831*), such a debtor could not be discharged from imprisonment, and neither could he be discharged under article 3 of the same title and chapter above mentioned, commonly known as the two-thirds act, nor under articles 4 and 5, in reference to "proceedings by creditors to compel assignments by debtors imprisoned on execution in civil causes," and in reference to "voluntary assignments by an insolvent, for the purpose of exonerating his person from imprisonment." The policy of the law is thus plainly indicated. Without

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further discussion here, it is sufficient to express concurrence in the satisfactory opinion at general term.

But it has been suggested that the appeal to the general term was not authorized. We are of opinion that it was. This was a special proceeding, as defined by the Code (*Secs. 1, 2 and 3 of the Code*). By chapter 270, of the Laws of 1854, an appeal to the general term of the supreme court is authorized from an order or final determination of the special term, in any special proceeding. The order of the special term in this proceeding was, therefore, appealable, unless the statute regulating the proceeding makes it final. Section 6 of article 6 provides that the court "shall proceed in a summary way to hear and determine the proofs and allegations, and may examine the applicant or his wife, or any other person, on oath, and if satisfied that the petition and account of the applicant are correct, and that his proceedings are just and fair, shall order an assignment to be made of all his property," &c.

There is no provision that the order shall be final or conclusive, but simply one that the order shall not be made until the court shall be satisfied. A court must always be satisfied of the existence of certain facts, as the basis of its action, before it can make an order, and yet it has never been held, in any reported case, that such language used in a statute evinces a legislative intention that an order made shall be final and conclusive in the sense that it cannot be appealed from.

The law of 1813 (2 *R. L.*, 408) regulating the opening and laying out of streets in the city of New York, provides for the appointment of commissioners of estimate and assessment, and that their report shall be confirmed by the supreme court, and that such report, when so confirmed, shall be "final and conclusive." It has been held that no appeal will lie to the court of appeals, from such an order of confirmation made by the supreme court; that the words "final and conclusive" were used to forbid an appeal (*Matter of Commissioners of Central Park*, 50 *N. Y.*, 493; *Matter of Canal*

Matter of Brady.

and Walker streets, 12 *id.*, 406). The same words were held to prevent an appeal to the court of appeals from an order of the supreme court, made at a general term, confirming the report of commissioners to appraise the compensation to be made for lands proposed to be taken under the general railroad act (*In the Matter of the N. Y. C. R. R. Co. agt. Marvin*, 11 *N. Y.*, 276). The right to review the decision of a single judge sitting at special term in a matter affecting substantial rights being general and fundamental, it must be deemed to exist unless the intent to destroy it is expressed with great clearness. It cannot be said that such an intent is expressed in the statute under consideration.

The order of the general term must be affirmed, but without costs of appeal to this court to either party.

FOLGER, RAPALLO and ANDREWS, JJ., concur. CHURCH, Ch. J., voted for reversal of general term and affirmance on merits. ALLEN and MILLER, JJ., voted for reversal of general term and affirmance of special term on the ground that no appeal lies from the special to the general term.

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SUPREME COURT.

THOMAS BOESE, as receiver, &c., agt. WILLIAM H. LOCKE
and others.

Bankruptcy — Insolvent law — Statute of New Jersey.

The statute of New Jersey entitled "An act to secure to creditors an equal and just division of the estates of debtors, who convey to assignees for the benefit of creditors," passed April 16, 1846, by its provisions is an insolvent law, and as such is suspended by operation of the United States bankrupt law; and an assignment made thereunder confers no title to the property upon the assignees and is void as against creditors.

New York Special Term, May, 1877.

ON the 3d of February, 1876, William Pickhardt and Adolph Kutroff recovered a judgment in the supreme court of this state against the defendant Locke, and such proceedings were thereupon had under such judgment that the plaintiff was appointed receiver of the property of the judgment debtor and duly qualified as such. On the 23d of September, 1875, the defendant Locke, then being a resident of the state of New Jersey, made an assignment for the benefit of his creditors to the defendants William King, John U. Goetchius and Edward E. Poor, who accepted the trust reposed in them by said assignment and reduced to cash the property of the said Locke, and the said assignees have brought certain of said moneys into the state of New York and deposited the same in a trust company here.

The plaintiff has brought this action to have said assignment declared fraudulent and void and to have the property which the defendants have in this state belonging to said Locke delivered over to the plaintiff as receiver.

C. Bainbridge Smith, for plaintiff.

Martin & Smith, for defendants.

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VAN BRUNT, *J.*—The defendants claim that this action cannot succeed, upon two grounds :

First, That the law of the state of New Jersey, pursuant to which this assignment purports to have been made, is in full force and effect and

Secondly, That if the above-mentioned act has been repealed by the United States bankrupt law, the assignment is a good one at common law.

It has been held by the United States supreme court that the bankrupt law has abolished all insolvent laws of the several states ; that is, that no debtor against the will of the creditors can be relieved of his debts except in the manner prescribed by the bankrupt law.

The first question, therefore, to consider, is whether or not the statute of New Jersey, under which this assignment is made, is to be considered in any respect as an insolvent law.

This act was passed on the 16th of April, 1846, and was entitled "An act to secure creditors an equal and just distribution of the estate of debtors who convey to assignees for the benefit of creditors."

Section 1 of that act provides "that every such conveyance shall be made for the equal benefit of the creditors," and prohibits all preferences.

Section 2 requires the debtor to annex a schedule of assets and liabilities.

Section 3 requires the assignee to give three weeks' notice, by publication in the newspapers, to creditors to present their claims.

Section 5 provides that, at the expiration of three months, the assignee shall file a list of creditors, and of their respective claims, and also provides that all claims against the estate must be made as prescribed by that act, or be forever barred from coming in for a dividend.

Section 11 provides that if any creditor shall not exhibit his claim within the term of three months above mentioned,

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such claim shall be barred of a dividend, unless the estate shall prove sufficient to pay the claims which have been presented in full, &c.

Section 14 provides that nothing in this act shall be taken or understood as discharging said debtor or debtors from liabilities to their creditors who may not choose to exhibit their claims. * * * But, with respect to the creditors who shall come in and exhibit their demands for a dividend, they shall be wholly barred from having, afterward, any action or suit at law or equity against such debtors or their representatives.

In the case of *Mayer agt. Hellman* (1 *Otto*, 496), the supreme court of the United States, referring to a statute of the state of Ohio, for the purpose of showing that the statute is not repugnant to the bankrupt law, uses the following language:

“There is nothing in the act resembling the insolvent law. It does not discharge the insolvent from arrest or imprisonment. It leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for the enforcing the trust are substantially such as a court of chancery would apply, in the absence of any statutory provision.”

The court, by this language, clearly intimates that if an act, by any of its provisions, exempts the insolvent from arrest or imprisonment, or relieves his after-acquired property from liability to any of his creditors, it is, in its nature, an insolvent law, and repugnant to the bankrupt law.

The statute of New Jersey under consideration, by its fourteenth section, expressly provides that all creditors who shall exhibit their claims to the assignees for a dividend, no matter how small such a dividend may be, shall be wholly barred from any action or suit at law or equity against such debtor or their representatives, thus clearly exempting the insolvent from arrest or imprisonment, and exempting his after-acquired property from liability to such creditor. These

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provisions clearly make the act in its nature an insolvent law, and consequently repugnant to the bankrupt law.

This brings us to the second proposition urged by the defendants, viz.: That even if the above-mentioned act has been suspended by the bankrupt law, the assignment is a good one at the common law.

The assignment provides that the trustees are to take possession of, and collect, and to sell and dispose of the same (meaning the property of the assignors) at public or private sale, and to distribute the proceeds to and among the creditors of the said William H. Locke, in proportion to their several just demands, pursuant to the statutes in such case made and provided.

The assignment, therefore, clearly appears to have been made subject to and in reference to the laws of New Jersey, respecting such instruments.

The assignees are to distribute the fund according to the laws of New Jersey, and they would violate the provisions of the trust deed did they make a distribution without complying with the provisions of those laws, and it seems to me as a necessary consequence that the assignor undoubtedly presumed that he would be entitled to the protection provided for by the statutes, pursuant to the provisions of which his assigned estate was to be distributed.

If this view is correct, the assignment cannot be sustained as a common-law assignment, but must be considered as having been made under a statute of New Jersey, the operation of which has been suspended by the bankrupt law.

In the consideration of these questions, I have not thought it necessary to consider what would have been the effect of the assignment had it not been void because of the bankrupt law.

For the reasons above stated, the assignment is void, and confers no title upon the assignees to the property of the defendant Locke.

The plaintiff is entitled to judgment, with costs.

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COURT OF APPEALS.

WILLIAM K. LAVERTY agt. WORTHINGTON G. SNETHAN.

Conversion — when agent liable in trover for.

The question as to when an agent is liable in trover for conversion is some times difficult. The reason stated.

If the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion ; but if he parts with it in accordance with his authority, although at a less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct.

February, 1877.

APPEAL from first department. The action was tried in the marine court, before Mr. justice MoADAM, in October, 1874. The jury found for the plaintiff for \$970. The judgment entered upon this verdict was affirmed upon appeal at the general term of the marine court and New York common pleas ; and from their affirmance thereof an appeal was taken, by leave of the latter court, to the court of appeals.

James C. Carter and B. C. Chetwood, for appellant.

Samuel Hand and Patterson & Major, for respondent.

CHURCH, Ch. J. — The defendant received a promissory note from the plaintiff, made by a third person and indorsed by the plaintiff, and gave a receipt therefor, stating that it was received for negotiation, and the note to be returned the next day, or the avails thereof. The plaintiff testified, in substance, that he told the defendant not to let the note go

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out of his reach without receiving the money. The defendant, after negotiating with one Foote about buying the note, delivered the note to him under the promise that he would get it discounted and return the money to defendant, and he took away the note for that purpose. Foote did procure the note to be discounted, but appropriated the avails to his own use.

The court charged that if the jury believed the evidence of the plaintiff in respect to instructing the defendant not to part with the possession of the note, the act of the defendant in delivering the note, and allowing Foote to take it away, was a conversion in law, and the plaintiff was entitled to recover. The exception has been criticised as applying to two propositions, one of which was unobjectionable, and therefore not available. Although not so precise as is desirable, I think that the exception was intended to apply to the proposition above stated, and was sufficient. The question as to when an agent is liable in trover for conversion is some times difficult. The more usual liability of an agent to the principal is in an action of assumpsit, or what was formerly termed an action on the case for neglect or misconduct; but there are cases when trover is the proper remedy. Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount, in law, to an appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition, or interfere with the owner's dominion, is a conversion (*Bouv. Law Dict., tit. Conversion*). SAVAGE, C. J., in *Spencer agt. Blackman* (9 Wend., 167), defines it concisely as follows: "A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of

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his goods." In this case, the plaintiff placed the note in the hands of the defendant for a special purpose not only, but with restricted authority (as we must assume from the verdict of the jury) not to part with the possession of the note without receiving the money. The delivery to Foote was unauthorized and wrongful, because contrary to the express directions of the owner. The plaintiff was entitled to the absolute dominion over this property as owner. He had the right to part with so much of that dominion as he pleased. He did part with so much of it as would justify the defendant in delivering it for the money in hand, but not otherwise. The act of permitting the note to go out of his possession, and beyond his reach, was an act which he had no legal right to do. It was an unlawful interference with the plaintiff's property, which resulted in loss, and that interference and disposition constituted, within the general principle referred to, a conversion; and the authorities, I think, sustain this conclusion by a decided weight of adjudication. A leading case is *Syeds agt. Hay* (4 T. R., 260), where it was held that trover would lie against the master of a vessel who had landed goods of the plaintiff contrary to the plaintiff's orders, though the plaintiff might have had them by sending for them and paying the wharfage. BULLER, J., said: "If one man who is intrusted with the goods of another, put them into the hands of a third person, contrary to orders, it is a conversion." This case has been repeatedly cited by the courts of this state as good law, and has never, to my knowledge, been disapproved, although it has been distinguished from another class of cases upon which the defendant relies, and which will be hereafter noticed. In *Spencer agt. Blackman* (9 Wend., 167) a watch was delivered to the defendant to have its value appraised by a watchmaker. He put it into the possession of the watchmaker, when it was levied upon by virtue of an execution, not against the owner, and it was held to be a conversion. SAVAGE, C. J., said: "The watch was intrusted to him for a special purpose — to ascertain its

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value. He had no orders or leave to deliver it to Johnson, the watchmaker, nor any other person." So when one hires a horse to go an agreed distance, and goes beyond that distance, he is liable in trover for a conversion (*Wheelock agt. Wheelright*, 5 *Mass.*, 104). So when a factor in Buffalo was directed to sell wheat at a specified price on a particular day, or ship it to New York, and he did not sell or ship it that day, but sold it the next day at the price named, held, that in legal effect it was a conversion (*Scott agt. Rogers*, 31 *N. Y.*, 676; *see, also, Boyce agt. Brockway*, *id.*, 490; *Addison on Torts*, 310, and cases there cited). The cases most strongly relied upon by the learned counsel for the appellant are *Dufresne agt. Hutchinson* (3 *Taunt.*, 117) and *Sargeant agt. Blunt* (16 *J. R.*, 74), holding that a broker or agent is not liable in trover for selling property at a price below instructions. The distinction in the two classes of cases, I apprehend, is, that in the latter the broker or agent did nothing with the property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property, a distinction which, in a practical sense, may seem technical, but it is founded, probably, upon the distinction between an unauthorized interference with the property itself and the avails or terms of sale. At all events, the distinction is fully recognized and settled by authority. In the last case, *SPENCER, J.*, distinguished it from *Syeds agt. Hay* (*supra*). He said: "In the case of *Syeds agt. Hay* (4 *Term R.*, 260) the captain disobeyed his orders in delivering the goods. He had no right to touch them for the purpose of delivering them on that wharf." The defendant had a right to sell the note, and if he had sold it at a less price than that stipulated, he would not have been liable in this action; but he had no right to deliver the note to Foote to take away, any more than he had to pay his own debt with it. Morally, there might be a difference, but in law both acts would be a conversion, each

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consisting in exercising an authorized dominion over the plaintiff's property. *Palmer agt. Jermain* (2 *M. & W.*, 282) is plainly distinguishable. There the agent was authorized to get the note discounted, which he did, and appropriated the avails. PARKE, B., said: "The defendant did nothing with the bill which he was not authorized to do." So in *Cairns agt. Bleecker* (12 *J. R.*, 300) where an agent was authorized to deliver goods on receiving sufficient security, and delivered the goods on inadequate security, it was held that trover would not lie, for the reason that the question of the sufficiency of the security was a matter of judgment. In *McMorris agt. Simpson* (21 *Wend.*, 610), BRONSON, J., lays down the general rule that the action of trover "may be maintained wherever the agent has wrongfully converted the property of his principal to his own use; and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tortfeasor." The result of the authorities is, that if the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. It follows that there was no error in the charge. The question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it (31 *N. Y.*, 490). It is also insisted that the parol evidence of instructions not to part with the note was incompetent to vary the terms of the contract contained in the receipt. This evidence was not

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objected to not only, but the point was not taken in any manner. The attention of the court was not called to it, and the court made no decision in respect to it. Under these circumstances, it must be deemed to have been waived, and is not available upon appeal. But if an exception had been taken, I am inclined to the opinion that the testimony was competent. It is not claimed that it varies that part of the receipt which contains an agreement to return the note or the money the next day, but that it varies the clause stating that the note was received for negotiation. This expresses the purpose of receiving the note, and if deemed a contract, can it be said that a parol mandate not to part with possession of the note before sale and receipt of money is inconsistent with it? There is no rule of law which gives an agent the right thus to part with a promissory note under the mere authority to negotiate. The instructions were consistent with the purpose expressed, although if they had not been given, a wider field of inquiry might have been opened. A promissory note passes from hand to hand, and a *bona fide* holder is protected in his title, and it might well be claimed that an authority to sell would not ordinarily justify a delivery to a third person without a sale. Without definitely passing upon this question, we think that the question should have been, in some form, presented at the trial. In a moral sense, the defendant may have acted in good faith, and hence the judgment may operate harshly upon him, but the facts found by the jury render him liable in this action.

The judgment must be affirmed.

All concur.

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N. Y. COMMON PLEAS.

JOHN W. PHENIX agt. CHARLES DUPY.

Examination of party before trial.

The examination of an adverse party before trial — provided for by section 891 of the Code — is a substitute for the former remedy by bill of discovery. The court has power to grant an order for such examination only where a bill of discovery would previously have been sustained in equity.

Such examination is not an absolute right without any qualification, but is subject to the rules and principles formerly applied by courts of equity to prevent abuse, oppression or injustice, and cannot be had without an affidavit showing that the discovery sought was of some matter material to the establishment of a cause of action or of a defense, and how it was material, so that the party could know exactly what he was called upon to discover, that he might, as in a bill of discovery, object to it as immaterial or improper, or if willing to do so, admit it; or if he were examined, that the judge might confine the investigation within the limits of the discovery sought.

In the restriction imposed upon the right of discovery before the Code (which applies equally to the examination of a party before trial, provided for by this section), it is well settled that a party could not be compelled to discover any matter which might subject him to a penalty, a forfeiture or a criminal prosecution.

In an action for libel, where the affidavits — on which the order for the defendant's examination before trial were granted — stated that the plaintiff would endeavor upon such examination to disclose that the letters which constitute the libel for which the actions are brought were published by the defendant; that they were published in malice; that they were received by the parties to whom they were addressed, and that in consequence the plaintiff was injured:

Held, that the discovery which the plaintiff seeks is to compel the defendant to disclose whether he has published a libel, or, in other words, whether he has been guilty of a criminal offense for which he could be indicted and punished, and is within the restrictions imposed, therefore the plaintiff has no right to the discovery sought.

General Term, June, 1877.

Phoenix agt. Dupy.

THE complaint is for damages for alleged libels.

Upon an affidavit the usual summons and order for examination of defendant, as a party before trial, were granted by judge ROBINSON, on the 28th day of February, 1877.

The grounds for the application are stated in the affidavit as follows: "To endeavor to disclose that the letters set forth in said complaint were published by said defendant; so in malice; were received by the parties to whom they were addressed, and that in consequence said plaintiff has been injured as alleged in said complaint; and furthermore, the same," *i. e.*, the examination, "is necessary to enable this plaintiff to successfully prosecute this suit, inasmuch as all the same said facts are not admitted, in said answer."

These are all the grounds stated for said application.

Upon the return day of the said summons and order the defendant made a motion upon the summons order, moving affidavit, and complaint, to vacate the said summons and order.

There were no affidavits offered in support of the motion.

This motion was denied, upon the ground that "the sufficiency of the moving affidavit was decided by the judge who made the order, and is not a subject of review at special term."

The summons and order were granted *ex parte*, on the affidavit of Charles Meyer, esq., plaintiff's attorney.

George W. Van Sieten, of counsel, argued the following points:

I. The application was granted *ex parte*. The defendant had no notice of it. He had had no opportunity to be heard upon it. This order, therefore, might have been vacated, without notice, by the judge who made it (*Code, sec. 324*). But the order, it will be observed, was granted on the last day, the twenty-eighth of February, and was made returnable by the learned judge who granted it, upon the sixth day of March. This court will take judicial cognizance of the fact

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that March 6, 1877, was Tuesday, and that by the appointment of this court, another judge came to sit at special term and chambers, on Monday, March 5, 1877. The learned judge, therefore, who granted this order, himself sent it before another judge, who would sit on March sixth.) The defendant had a right, under section 324 of the Code, to notice a motion to vacate this order. He also had a right, upon the return day set by the court, to move upon the moving papers to set aside the order; certainly, on one ground, that the papers upon which it had been granted did not confer jurisdiction upon the court. Could not a party object to an order in supplementary proceedings, or move to set aside an order of arrest, or an injunction, granted at the end of a term, until the learned judge who had granted it should come again to special term or chambers? The judge who granted the order may refuse, even where permission to apply to him had been given, to hear the order again, or to perform double duty at trial and special terms. Or must the party submit to and be injured by the *ex parte* order, or be punished for contempt, until his appeal can be heard? The learned judge, at special term, therefore, erred in denying the motion to set aside, upon the ground to do so would be to review the sufficiency of the affidavit which was decided by the judge who made the order. It having been in the power of the court at special term to have set aside this order and summons, it remains, then, to show that the same should have been set aside. Upon that point I beg leave to repeat the following arguments already made upon the appeal from the original order for examination of defendant:

1. While the order for such examination is in the discretion of the court, that discretion can only be exercised where the court has power to grant such an order. The court has power to grant an order for examination of party before trial, in a case in which equity would formerly have sustained a bill of discovery. The power given by the Code to examine an adverse party before trial is a substitute for the bill of

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discovery in chancery (*Glenny agt. Stedwell*, 51 *How. Pr.*, 329; *Carr agt. Great Western Ins. Co.*, 3 *Daly*, 160). In the case at bar would a bill of discovery have been granted in equity? It would not, for the following reasons:

2. The facts that plaintiff desires to prove can easily be proved in another way, and plaintiff was, therefore, not entitled to the order (*Gelston agt. Hoyt*, 1 *Johns. Ch.*, 543; *Brown agt. Swann*, 10 *Pet.*, 501; cited 1 *Abb. New Cases*, 338). The facts that plaintiff desires to prove are set forth in the affidavit of Charles Meyer. (a.) That "the letters set forth in the complaint were published by the defendant." Let that be proven by those to whom they were published. (b.) "So in malice." This can be proven by the circumstances preceding and surrounding the publication, and by showing want of probable cause. (c.) That the letters "were received by the parties to whom they were addressed." This can only be proven by those parties any way. (d.) "That in consequence said plaintiff has been injured as alleged in said complaint." The plaintiff can prove that himself. Besides, the plaintiff must have known the aforesaid facts already, or he should not have vexed this defendant with this action. If this plaintiff has sued this defendant for \$14,000 damages for having written and published the alleged libelous letters, so in malice, that they were received by the parties to whom they were addressed, and that the plaintiff has consequently been so greatly damaged, without his (plaintiff's) having known, before he brought his suit, all those facts, a court of equity will not aid him to find all this out, and prove it out of defendant's own mouth, thus rendering the latter liable to indictment. This method of examination is not to be used by a party "to get information as to whether he had any case" (*ROBINSON, J., in Schepmoes agt. Bousson*, 52 *How.*, 401).

3. The examination could not have been granted in aid of indictment (*See Montague agt. Dudman*, 2 *Ves., Sr.*, 398).

4. The bill of discovery would not have been allowed,

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and, consequently, the court had no power to grant an order for examination, to compel a party to answer as to matters which, it appears from the papers, would tend to subject him to indictment, penalty or forfeiture, or any thing in that nature, other than the loss of the claim in suit (*Taylor agt. Bruen*, 2 Barb. Ch., 301; *Conant agt. Delafield*, 3 Edw. Ch., 201; *Sharp agt. Sharp*, 3 Johns. Ch., 407; *Deas agt. Harvie*, 2 Barb. Ch., 448; *Leggett agt. Postley* 2 Paige 599); *e. g.*, it was not allowable in libel or slander as against defendant (*Marsh agt. Davison*, 9 Paige, 580; *Bailey agt. Dean*, 5 Barb., 297). The action, at bar is for damages for alleged libel. If defendant should answer affirmatively the plaintiff's questions upon the points set forth in the moving affidavit, it would subject defendant to indictment. The plaintiff's attorney swears that he will, upon such examination, "endeavor to disclose that the letters set forth in said complaint were published by the defendant, so in malice, were received by the parties to whom they were addressed; and that in consequence said plaintiff has been injured as alleged in said complaint.

5. The defendant, as a witness, could not be compelled to answer any question, if the answer would tend to criminate him, or would form a link in a chain of evidence which would render him liable to indictment (*The People agt. Mather*, 4 Wend., 229; *Ex parte Tappan*, 9 How., 394). A bill of discovery would not be sustained against him in such a case (*Taylor agt. Bruen*, 2 Barb. Ch., 301; *McIntyre agt. Mancius*, 16 Johns., 592).

6. But it will be urged in support of the order for examination of defendant, that the defendant must appear and be sworn as a witness; that he may then refuse to answer questions which tend to criminate him; but that he must answer all other proper questions. The correct principle of the rule that the order can only be granted where a bill of discovery could be sustained, and that no bill of discovery could be sustained, and that, consequently, no order for examination

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of the defendant can be granted, in a suit for libel is herein well illustrated. The party is to be examined as a witness. The evidence sought must be material. Any questions on matters immaterial or irrelevant to the issue may be objected to by the defendant's attorney, and the objection would be sustained. The defendant, therefore, can be interrogated on this examination only as to matters relevant to the issue. What is the issue? Libel. In the words of the moving affidavit, "that the letters set forth in the complaint were published by the defendant, so in malice, were received by the parties to whom they were addressed; and that in consequence said plaintiff has been injured as alleged in said complaint." The answer to every question, therefore, which the plaintiff can ask this defendant relevant to the issue, and he can ask no other, would tend to convict the defendant of libel, or form a link in the chain of evidence which might render him liable to punishment. But none of such questions may be asked the defendant; he need answer none of them. Take, for example, the first question which was asked this defendant, when the examination went on under the order appealed from (a stay of proceedings pending this appeal having been refused): "Are you the defendant in this action?" If joined to other questions put to other witnesses on the trial, this might be a link in the chain; it is only "identification," but identification is an important point in a criminal trial. I have in mind a notable case in which ex-mayor Hall lately appeared for the defense, and raised that very point of identity of the accused. In *Conner agt. Bradley* (*Anthon's Nisi Prius*, 99), an action for usury, the witness was sworn, and, upon being asked the first question, stated to the court that "he had been interested and concerned in the contract from the beginning," and claimed his privilege. No questions were asked. And upon this point, that the witness cannot be forced to answer, if it would tend to criminate him to a penalty, let me cite *Cloyes agt. Thayer* (8 Hill, 364 [usury]); *Burns agt. Kempshall* (24 Wend, 360 [usury]).

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COWEN, J., says: "Any one of them" (the questions) "might, if answered, have furnished a link in the chain of proof that usurious interest had been paid" (*Byass agt. Smith*, 4 *Bosw.*, 679 [counterfeiting label]; *Van Tine agt. Nims*, 12 *How.*, 507 [bribery]; *Vilas agt. Jones*, 10 *Paige*, 76 [usury]; *Fellows agt. Wilson*, 31 *Barb.*, 162 [do.]; *Curtis agt. Knox*, 2 *Denio*, 341 [do.]; *Ward agt. The People* 3 *Hill*, 395 [larceny]; *Ex parte Tappan*, 9 *How.*, 394 [libel]; *People agt. Marten*, 4 *Wend.*, 229; *Conspiracy to Kidnap [Morgan's Case]*; *Citing* 16 *Vesey*, 242). "If it is one step having a tendency to criminate him, he is not compelled to answer" (*Citing*, also [on *Simony*], *Parkhurst agt. Lawton*, 2 *Swanst.*, 215), "however remotely connected with the fact" (*Citing*, also, *Burr's Trial*, 434, MARSHALL, Ch. J., "*Many links compose the chain*").

Charles Meyer, of counsel for the respondent, argued the following points:

The order and summons for the examination of the defendant before trial were properly granted. The moving affidavit discloses every fact necessary to the ordering the examination. The circumstance that the affidavit discloses a desire on the part of the plaintiff to prove by the defendant certain facts to which he *personally*, not by counsel, nor yet the court, could object, is no objection to the granting of the order. It is an absolute and unqualified right of the plaintiff to examine the defendant before trial, and that right cannot be denied or abridged by reason of the possibility of an improper line of examination being resorted to. When an improper question is asked of the witness, it may then be objected to, and then, and only then, passed upon. Not now by anticipation. The testimony sought to be obtained from the defendant, as disclosed by the affidavit, is perfectly proper in itself. If there be an objection to it, as suggested by counsel, that it would tend to criminate the witness, that is a personal privilege to him, which he can exercise, and *he alone*, and *when examined*, not before. And it must be claimed *under oath*

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(*Parry* agt. *Almond*, 12 *Serg. & Rawle*, 284; *United States* agt. *Burr*, 1 *Robertson's Trials*, 207, 208, 242 to 245). Inasmuch, therefore, as the learned judge who ordered the examination could not raise the objection, the examination was properly ordered, the privilege being still with the witness *upon the examination*. It has been urged by appellant that the right to examine a party before trial is a substitute for a bill of discovery under the old practice. This is so only in the sense that one remedy has been abolished and another established, which accomplishes the same result, but not in that the new remedy is governed by the same rules as the old, where the cases are not parallel. The statute gives the absolute and unqualified right to examine an adverse party before trial, subject only to the rules of examination as are in vogue upon the examination of any witness, either conditionally or upon the trial (*Code*, *secs.* 389, 391). Under the old practice, the interrogatories were substantially proposed by the *bill* of discovery, and the objections were properly entered to the interrogatories (*i. e.*, issue joined upon the bill) then; but under section 391, *Code*, these objections could not be interposed upon the granting of the order of examination, inasmuch as no interrogatories are then proposed. The judge, in granting the order, could not speculate upon possibilities (which exist in every case) that an improper question would be asked, or that a privilege personal to the individual to be examined, not as defendant, but *as a witness* would be claimed (*Greenl. on Evidence*, *vol.* 1, *sec.* 451). The privilege, until claimed by the witness, could not be asserted, either by the court or by counsel for either party to the suit. Charles Dupuy occupies two positions with respect to this proceeding, that of defendant, and that of a witness. As defendant, he may object by counsel, to any inquiry which is incompetent, irrelevant or immaterial, as injuriously affecting his rights in the action; and, as a witness, he may object to any inquiry, the result of which would tend to criminate him. The latter is a personal privilege, having no reference to the

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action; he is not entitled to counsel, and must claim his privilege without suggestion from the counsel *for him as defendant*, he *as witness* being entitled to no counsel (*Thomas agt. Newton*, 1 *Mood. & Malk.*, 48, note). Inasmuch, then, as the inquiry sought by the plaintiff, as appears by the moving affidavit, was in itself proper, having reference to the cause of action, and the objection alleged is a personal privilege to the witness, which *he* has not claimed and could not claim until examined, and the moving affidavit presents proper grounds for granting the order and summons, the objections raised by the *defendant*, through his counsel, it is respectfully submitted, are untenable.

DALY, Ch. J. — The examination of an adverse party before trial provided for by section 391 of the Code is a substitute for the former remedy by bill of discovery, which was abolished by this chapter of the Code, and may be had where a bill for a discovery would previously have been sustained (*Car agt. W. W. Ins. Co.*, 3 *Daly*, 160; *King agt. Leighton*, 58 *N. Y.*, 383; *Glenny agt. Stedwell* [*Ct. of App.*] 51 *How.*, 329; 1 *Abb. N. C.*, 273, and note 382; *Wiggin agt. Gans*, 4 *Sandf.*, 647).

This remedy was formerly the only way in which proof of a fact exclusively within the knowledge of one of the parties could be obtained, because parties in actions at law could not then, as they can now, be called as witnesses upon the trial. It was, moreover, the only effectual mode of getting at a knowledge of the contents of documents which were in the possession of the other party, and of proving what they contained; for the relief which courts of law could afford was limited and attended with many difficulties before the statutory remedy was enacted for compelling the production and inspection of books and papers by a motion before trial. The statutory provision allowing parties to be examined as witnesses, either on their own behalf or by the adverse party, and of compelling, by motion, the inspection of books and

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papers, have to a great degree dispensed with the necessity of this discovery of evidence before trial, although the right to it remains the same as before.

In view of the abuses that would arise if a party, either before any action was brought or before he had stated his cause of action in a pleading, or after an answer had been served, were allowed, without any restriction or limitation, to subject the other party to an inquisitorial investigation, under oath, to ascertain whether he could make out a cause of action, or whether his adversary could probably succeed in establishing a defense, courts of equity, at an early period, imposed limits to such investigations, by requiring that it should appear by the bill that the matter sought to be discovered was essential to the establishment of a cause of action or of a defense. "A system of judicial inquiry," says Mr. Hare, "would be obviously defective, which had no means of obtaining and compelling a production of evidence from the parties themselves, whilst a system which should set no bounds to the power of scrutiny would be fertile in expedients of oppression." And in respect to the rules and principles by which courts of equity were guided in allowing or refusing such discoveries, he further remarks: "They are the result of that scrupulous care with which a long succession of eminent judges have asserted the power of judicial investigation, without sacrificing the security and secrecy which all are entitled to claim and to preserve. They define and reconcile the rights of individual privacy and the demands of public justice. They express the extent of the privilege," whilst the limits they impose are "identified with the administration of justice, and depend upon principles which are perpetual" (*Hare on Discovery*, 11, 12 and 13).

Bills for the discovery of evidence being, however, expensive and dilatory, were so seldom resorted to after the inspection of documents could be compelled by motion, and especially after parties could in all cases be examined as witnesses, that the object of this provision in the Code abolish-

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ing such bills, and substituting in their stead the simple and inexpensive procedure provided for by section 391, was not understood. By many it was interpreted literally, as giving the right to examine the party before trial, without any restriction or limitation whatever, wholly overlooking the history of this branch of jurisprudence and the abuses, injustice and oppression that could be practiced if that were permitted. Judge J. L. MASON, it is true, shortly after its enactment declared, in *Wiggin agt. Gaines* (4 Sandf., 647), that this provision was a substitute for bills of discovery, and nothing else; "that the examination referred to in it meant, upon every fair principle of interpretation, any examination for the purpose of discovery in which formerly a bill of discovery would have been resorted to;" and that "wherever a bill of discovery could have been filed, under the former practice, in support or defense of an action, there the party might be examined in the mode presented in this chapter, and in no other mode." But this interpretation was not followed, and it was held in subsequent cases, as it had been previously held, that upon a simple notice of five days, given by the opposite party—except the judge should, by order, fix a different time—a party was compelled, before the trial, to appear before the judge, at the time and place specified, and be examined under oath as a witness (*Taggart agt. Gardner*, 2 Sandf., 669; *Green agt. Wood*, 15 How., 342; *Cook agt. Bidwell*, 19 id., 483).

In *Garrison agt. The Mariposa Co.* (N. Y. Com. Pleas, S. T., 1868), I declined to follow these cases, and held, as judge MASON had held, that it was simply a substitute for the former remedy by bill of discovery; that it was, consequently, subject to the rules and principles that courts of equity had applied to prevent abuse, oppression or injustice, and could not be had without an affidavit showing that the discovery sought was of some matter material to the establishment of a cause of action or of a defense, so that the party could know exactly what he was called upon to dis-

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cover, that he might, as in a bill of discovery, object to it as immaterial or improper, or, if willing to do so, admit it; or, if he were examined, that the judge might confine the investigation within the limits of the discovery sought (*And see Carr agt. G. W. Ins. Co., 3 Daly, 160*).

The effect of holding that this examination of a party before trial was an absolute right without any qualification or restriction, soon became apparent where the party summoned his adversary to be examined in this way, before any complaint was filed and where the judge had nothing before him to indicate what the examination was to be about, and was left wholly without guide as to its extent, range or purpose. In view of this difficulty, and the consequence to which it would lead, it was held in a large number of cases (*from Chichester agt. Livingston, 3 Sandf., 718, to Norton agt. Abbott, 28 How., 388*) that this examination could not be had at all until after issue joined. But this did not suffice. In later cases, this construction, for which there never was any foundation, was not adhered to, and it was held that the examination might be had either before or after issue joined (*Mc Vicar agt. Ketchum, 1 Ab. [N. S.], 452; Bell agt. Richmond, 50 Barb., 571*), and to meet, under this interpretation, the difficulty before suggested, it was held, first by BARBOUR, J., in *Green agt. Herder* (7 Rob., 455), that if the application is made before the service of a complaint, it must be upon an affidavit stating: First, if made by the plaintiff, the nature of the action and demand; second, if made by the defendant, the nature of his defense; third, the name and residence of the witness, and afterwards by JONES, J., in *Duffy agt. Lynch* (36 How., 509), that it must be upon an affidavit setting forth with particularity the facts and circumstances out of which the plaintiff supposes the cause of action to have arisen, the relief he supposes he is entitled to, the defense he anticipates, and the subjects upon which he desires to interrogate the other party. And this conflict of decisions led to the adoption, by the convention of judges, in

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1870, of the twenty-first rule, the requirements of which were, in effect, to construe the section 391 as providing for the kind of discovery by the examination of a party before trial which was formerly obtained by a bill in equity, and so far as it is applicable, the practice which prevailed in equity is necessarily the guide as to the extent and nature of the discovery to which the party is entitled by such an examination.

I have entered thus at length into an examination of this subject and of the contrariety of views and the confusion that has prevailed respecting the object of this section, for the reason that even now scarcely a week passes in this court without an application being made for the examination of a party under it, without any thing being presented but an order for his examination at a specified time and place; so difficult has it been to impress upon practitioners that they have not the right to bring a party up in this way, before trial, and require him to answer, under oath, any questions that they may put to him.

In equity a party was allowed to discover from his adversary any matter which was material to the establishment of his cause of action or of his defense, although he might have other witnesses to prove it, as the admission of the matter would dispense with the necessity of calling the witnesses, and it was no answer to the application that the other party might be examined as a witness upon the trial, for the one filing the bill was not bound to call him, as a witness, on the trial, but might have a discovery previously from him as a party (*Plummer* agt. *May*, 1 *Ves. Sr.*, 426; *Montague* agt. *Didman*, 2 *id.*, 398; *Finch* agt. *Finch*, *id.*, 492; *Tooth* agt. *Dean of Canterbury*, 3 *Sim.*, 46; *March* agt. *Davidson*, 9 *Paige*, 601; *Story's Eq. Pleadings*, sec. 119 and note; *Wigram on Discovery*, 2, 4; *Hare on Discovery*, 1, 110, 116, 187). And that this was what was meant by the codifiers in framing this section, appears from their referring in their report to "the great benefits to be expected by the relief it

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would afford to the rest of the community by exempting them from attending as witnesses to prove facts which the parties respectively know and ought never to dispute" (*First Report of Coms.*, pp. 244, 245). That the party from whom the discovery was sought might be protected, the one filing the bill was obliged to show, not only that the matter sought to be discovered was material, but how it was material (*McIntyre agt. Mancius*, 3 *Johns. C. R.*, 47; *id.*, in error, 16 *Johns.*, 599; *Kimberly agt. Sells*, 3 *Johns. C. R.*, 467; *Lane agt. Stebbins*, 9 *Paige*, 624, 625). And, as a further protection, a discovery was not allowed as to a certain matter to which I shall have occasion to recur.

The affidavits on which the order for the defendant's examination in these two cases, before trial, were granted, state that the plaintiff shall endeavor, upon such examination, to disclose that the letters which constitute the libel for which the actions are brought, were published by the defendant; that they were published in malice; that they were received by the parties to whom they were addressed, and that in consequence the plaintiff was injured.

The letters being libelous, the law would imply that there was malice, and that the plaintiff was injured by their publication; and as no fact is stated in the affidavit showing a tendency to show actual malice or specific damage, the discovery sought is reduced to the inquiry whether the defendant published the letters and to whom he sent them. The discovery which the plaintiff seeks is to compel the defendant to disclose whether he has published a libel, or, in other words, whether he has been guilty of a criminal offense for which he could be indicted and punished.

In the restriction imposed upon this right of discovery, nothing was better settled than that a party could not be compelled to discover any matter which might subject him to a penalty, a forfeiture, or a criminal prosecution (*Hare on Discovery*, part 3, chap. 1, sec. 1; *Wigram on Discovery*, 60, secs. 83, 94). "A plaintiff," says Mr. Wigram, "whatever

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the merits of his case may be, is not entitled to a discovery from the defendant, of any matter which would criminate him or tend to do so" (*Wigram on Discovery*, 195). Lord ELDON, in *Paxton agt. Douglass* (19 *Ves.*, 226), went even further, saying: "The strong inclination of my mind is to protect the party against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards it." In *Bailey agt. Dean* (5 *Barb.*, 303), judge PRATT was of opinion that a defendant could not be compelled to disclose facts to enable a plaintiff to sustain an action of slander, because in such actions punitive damages may be given; and in *Browsward agt. Edwards* (2 *Ves.*, *Sr.*, 246), lord HARDWICKE said that the court would not force the party, by his own oath, to subject himself to punishment for usury (See *March agt. Davidson*, 9 *Paige*, 585; *Taylor agt. Bruen*, 2 *Barb. C.*, 301; *In the Matter of Tappan, &c.*, 9 *How.*, 394; *The People agt. Mather*, 4 *Wend.*, 254; *In the Matter of Kiss*, 1 *Paige*, 607).

It is apparent upon the face of the affidavits, that the plaintiff had no right to the discovery sought, and both orders should, therefore, be vacated.

J. F. DALY and LARREMORE, JJ., concurring.

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ONEIDA COUNTY COURT.

DANIEL HAYES agt. DENNIS BUCKLEY.

Supplementary proceedings—appointment of receiver—property vests without any assignment.

Since the Code, the appointment of a receiver, in proceedings supplementary to execution, vests in the receiver *all* the property, both *real* and *personal*, of the judgment debtor, without any assignment.

*Utica, March, 1877.**L. W. Fiske*, for receiver and motion.*Walter Ballou*, for judgment debtor, opposing motion.

R. D. JONES, *Special County Judge*.—On the sixteenth day of February last, in proceedings supplemental to execution in the above-entitled action, on a judgment recovered therein in this county, and in which county the defendant and judgment debtor resided at the time of issuing the execution to the sheriff of this county, I made an order appointing one Alfred Morling a receiver of the property, equitable interests and things in action of Dennis Buckley, the judgment debtor above named. The order thus made was on a printed blank and contained a clause requiring the judgment debtor to execute, acknowledge and deliver to the receiver a proper and valid assignment and conveyance of all of the lands and real estate of the debtor wheresoever the same might be situated. I did not notice the existence of such a clause in the order when I signed it. After his appointment, Morling duly qualified as such receiver, and received a certified copy of the order

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appointing him such receiver, and he thereupon entered upon his duties as such receiver. It now appears from the moving papers in this matter that Dennis Buckley, the judgment debtor, at the time of the service on him of the order for his examination in this matter, owned real estate situated in this county, and also that he owned the same at the time of the appointment of such receiver in this matter; that since then the said receiver has requested said judgment debtor to convey such real estate of said judgment debtor to him, the said receiver, and that the judgment debtor has refused to comply with such request, and now refuses to convey or assign such real estate to said receiver, as requested. On the fifteenth day of March, instant, an order was obtained by the attorney of the receiver from me, requiring said judgment debtor to show cause before me this day why he should not be punished as for contempt in refusing to execute such assignment and conveyance in obedience to the terms and requirements of said order made by me on the sixteenth day of February last, and said clause therein contained, all other misconduct charged in said order to show cause is now waived, and the motion to punish for contempt is now vested solely on such refusal and omission of the judgment debtor to convey and assign his real estate to the receiver, as requested.

It is urged, on the part of the receiver, that I have the right to direct such conveyance and assignment to be made, and for such refusal and omission to convey and assign the real estate, I have the right to adjudge the judgment debtor guilty of contempt and punish him therefor.

The counsel of the judgment debtor, in opposition to the motion, maintains that I have not the right to direct such assignment and conveyance to be made nor to punish for such refusal; that the title to said real estate passed to the receiver in virtue of his appointment as such receiver, his qualifying and receiving from the clerk of this county a certified copy of said order appointing him such receiver, and that a conveyance or assignment of such real estate to the receiver

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by said judgment debtor is not necessary to vest the title thereof in such receiver.

I think the position assumed by the judgment debtor's counsel is correct, and that I must deny the motion. Now, as this is the third or fourth motion made before me involving the same precise question, and each has been disposed of by me in the way that I have indicated I must do with this, I have thought it but proper to present my views in writing upon the question, and to the end that the question may be set at rest so far as I am able to do the same. No case has yet fallen under my observation holding that title to real estate does not pass to a receiver appointed in proceedings supplemental to execution without a conveyance or assignment thereof to the receiver by the debtor, except the case of *Moak, Receiver*, agt. *Coats* (33 Barb., 498), which at first blush, seemingly, does so hold. If the law required such assignment or conveyance to cause the title thereof to pass to the receiver, I would not hesitate in holding that I possessed the power to punish the judgment debtor for such refusal, as section 302 of the Code of Procedure would prove broad enough to confer such power on me. The power of the officer there mentioned to punish disobedience of his orders only extends to disobedience of orders which the officer has power to make and enforce. Now, the question arises, have I the power to direct the judgment debtor to convey and assign his real estate to the receiver, and is the receiver vested with the title to such real estate without such conveyance? I think, notwithstanding the case of *Moak* agt. *Coats* (ante):

First. That I, as an officer at chambers, had not the power to make an order directing such conveyance, and that that clause contained in said order appointing said receiver, requiring such conveyance and assignment, is inoperative and void, and the insertion thereof in the order was in excess of my judicial power.

Second. That the receiver became vested with the title of

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said real estate without such conveyance or assignment; that his appointment, the filing and recording of the order, his giving the required bond, its approval, and his receiving a certified copy thereof from the clerk of this county, vested him with the title of said real estate.

I have stated that no case has fallen under my observation holding a conveyance or assignment necessary, except *Moak agt. Coats*, which at first blush, seemingly, does. I think it conceding too much to admit it to have been the opinion of the court in that case that a conveyance or assignment was necessary. I think it safer to say that CAMPBELL, J., in his written opinion in the case of *Moak agt. Coats*, said such was the law. From an examination of the opinion, it is, it seems to me, impossible to determine upon what precise point the case was decided by a majority of the court. CAMPBELL, J., in the latter part of his opinion, says: "There are other grounds which, I think, would be fatal to the plaintiff's right to recover. He represents a creditor who was a creditor by reason of another debt, and who received payment of the prior debt out of the proceeds of sale paid by the defendant; and, after having proved his prior debt before the referee appointed by the court, at the time of making the order for the sale under which the defendant purchased, I think he should be treated as a party to those proceedings, and should now be estopped from disaffirming them through his receiver." To enable me to fully understand upon what facts such statement was made by CAMPBELL, J., in his opinion, I procured a copy of the printed case, and have examined the same, and I find such facts to be as follows, viz.: On the 30th day of September, 1850, one Horace Coats, of Otsego county New York, died intestate, leaving him surviving, Catharine Coats, his wife, and two minor children; that, at the time of his decease, said Horace Coats was the owner of the lands and premises which were subsequently sold and conveyed to the defendant in the case, and a portion of which the receiver

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sought to recover ; that said Catharine Coats was afterwards appointed the sole executrix of the estate of her deceased husband ; that she and the two minor children continued to reside together on the premises until the defendant in the action went into possession thereof, which was April 1, 1857 ; that, at the time of his decease, Horace Coats owed some debts ; on the 11th day of September, 1856, Catharine Coats confessed a judgment for \$127.54, in the supreme court of this state, in favor of one William Duffin ; that the debt for which the judgment was confessed was for goods and groceries furnished her from Duffin's store, from May 26, 1855, to July 23, 1856 ; that, on the 13th day of September, 1856, such judgment was docketed in the county clerk's office of Otsego county ; execution in the usual form was issued thereon on the 15th day of September, 1856, and returned unsatisfied on the 17th day of September, 1856. On the 23d day of September, 1856, on a proper affidavit, judge GOULD granted an order, in proceedings supplemental to execution, against said Catharine Coats, on said judgment, requiring her to appear and answer before N. C. Moak, as referee, on the 30th day of September, 1856 ; she appeared and was examined under such order ; and the referee's report showed the discovery, on such examination, of her right to dower in said premises. On the 17th day of October, 1856, judge GOULD appointed said Moak receiver of her property ; and that, on the 11th day of November, 1856, the bond of said receiver was duly approved, and the same was on that day duly filed in the clerk's office of Otsego county. On the 17th day of February, 1857, said Moak, in the name of said Catharine Coats, by him as receiver, petitioned the surrogate of Otsego county for the appointment of a special guardian to protect the interest of said two minor children in proceedings for the admeasurement of the dower of Catharine Coats ; and on same day the surrogate of said county granted an order for that purpose, appointing one E. M. Harris such special guardian. On same day a petition

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was presented to said surrogate for the admeasurement of such dower, with due proof of service on said special guardian. On the 16th day of April, 1857, said surrogate made an order appointing three commissioners, therein named, to make admeasurement of dower, and they duly took the oath required of them. On the 3d day of June, 1857, the commissioners made their report admeasuring her dower, and the report was filed and confirmed by the surrogate on the 8th day of June, 1857. It appears, from admissions in the case, that no notice of the proceedings before the surrogate was given to the defendant in the case, who is Moses Coats. On the 10th day of July, 1855, a petition, bearing date July 9, 1855, of the two infants by Catharine Coats, their mother, and next friend, was presented to the Otsego county court for the appointment of a special guardian of the two infants, for the sale of the said real estate of the two infants; and she alleged in the said petition that she was willing to, and desired to, join in the sale of said real estate, and thereby release her dower interest in the same. She also alleged that she was appointed the administratrix of the estate of Horace Coats, deceased, and that the personal property of said deceased was insufficient to pay the debts of said estate, and that there were due from said estate, for debts unpaid of the estate, about \$225. She further alleged that she and the two infants had, since the decease of said Horace Coats, lived together as one family, and were then living together, and that they had necessarily incurred debts and liabilities for their maintenance and the education of said two infants, and for which they had no means of paying, except out of the proceeds of the sale of said real estate, and which debts were due to divers parties, who had given them credit to the amount of about \$800, which should be equally shared between them, as they three had each had their necessary support out of the same, and that they were willing that all of such indebtedness should be first paid out of the moneys arising from the sale of said real estate, if

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a sale thereof should be ordered by the court. That the premises were free from incumbrances, except the said amount of moneys unpaid of the debts owing by said Horace Coats, at the time of his decease. And she averred that neither of the said two infants or her were in want of any portion of the principal sum to be obtained for said real estate, except that they desired that the special guardian to be appointed should be directed first to pay, out of the moneys arising upon such sale of said real estate, the said indebtedness of said real estate, and the said indebtedness of about \$800 of the three, to wit: her and the two infants, made as aforesaid, the indebtedness to be ascertained by a referee to be appointed therein. She also stated in said petition that she did not wish to receive the then present value of her dower interests in said premises, but that she wished to have one-third part of the avails of the sale of said real estate (after first paying the said indebtedness of herself and the said infants) invested, the principal sum thereof for the use of said infants, at her decease, and that the interest money arising therefrom might be paid over annually to her during her lifetime. The reason for the presentation of the petition, as stated, were briefly these: That the three were unable to manage the lands so as to make them a comfortable support, and that they had no other means of support, or for the payment of said indebtedness, and that the premises were fast getting out of repairs, and they were unable to repair the same; and that, in their opinion, the money arising from the sale thereof, invested, would be more productive to them. * * *

On the same day an order was made by said county court, appointing Wm. Marks as special guardian, for the purpose of conducting such sale of the real estate, and the matter was, by said order, referred to Charles McLean, to ascertain the truth of the facts of said petition, and whether a sale would be beneficial, &c., and what amount of moneys were necessary to be paid out of the proceeds of sale to pay said debts due from the estate of said Horace Coats, deceased, and which

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were owing by him in his lifetime, and at the time of his decease, and to whom the same was then due, over and above the full amount of the moneys arising from the personal estate of said Horace Coats, deceased, and also to ascertain and report the amount of indebtedness referred to in said petition, created for the necessary support, maintenance and education of said petitioners, to wit: The two infants and her, Catharine Coats, and the names of each of the persons to whom such indebtedness existed, and the amounts due to each of such persons.

On the 5th day of February, 1856, said McLean, referee, reported to said court that he was satisfied that all the material facts of the petition were true, and that a sale of the whole premises would be for their benefit; and he further reported that the amount of money necessary to pay the debts of Horace Coats, deceased, which were owing by him at the time of his decease, and for which there was no personal property belonging to his estate to pay, and which had been advanced by and was due to Harmon Howland, was the sum of \$239.07.

That the amount of the indebtedness referred to in said petition of said petitioners, created for the necessary support and maintenance and education of said petitioners, and the names of the several persons to whom such amounts were then due, and the several amounts were as follows: The name and amount of each being given and amounting in the aggregate to \$1,218.68. In the list appears said William Duffin for nineteen dollars and sixty-seven cents. That of said sum of \$1,218.68, \$979.61 had been incurred for the equal benefit of said infants and their mother, Catharine Coats, and that said sum, with such interest as might accrue thereon, should be first deducted from the whole purchase-price of said lands and one-third part of the remainder invested at interest secured by bond and mortgage, the principal sum to remain during the lifetime of said Catharine Coats and the annual interest thereon to be paid to her annually during her lifetime, and the principal at her

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decease should be paid to the said infants in equal portions, or to their heirs or assigns; that said sum of \$239.07, with interest thereon, should be paid to said Harmon Howland, out of the share of said infants to them remaining, for money by him advanced for the payment of debts due from said Horace Coats at the time of his decease, and he further reported that he had not ascertained the value of her dower interest upon the principles of life annuities for the reason that in the petition she had elected to have one-third of the money arising from the sale of lands, after paying the said indebtedness, invested or secured by bond and mortgage for her during her life, or the annual interest arising from the same, and that she (Catharine Coats) was entitled as the widow of Horace Coats, deceased, to dower in the whole of said lands in which she, by said petition, consented to join in the sale thereof. On the 11th day of February, 1856, an order was made by said court confirming said report of said McLean, and authorizing the special guardian to contract for the sale of the right, title and interest of said infants in said real estate. On the 11th day of February, 1856, a contract was entered into for the sale thereof, and the guardian also included in the agreement the sale of the interest of Catharine Coats therewith for the sum of \$3,230, to be paid as follows: The sum of \$1,400 in cash and so much more as the purchaser (Moses Coats, the defendant in *Moak agt. Coats*) might see fit to pay on the 1st day of April, 1856, and the remaining portion of the purchase-money to be then secured by bond and mortgage of said Moses Coats, payable as therein provided.

On the said 11th day of February, 1856, said contract was reported to the court.

On the same day an order was made by said court confirming said report and authorizing a conveyance in pursuance thereof, and directed the payment of said debt of said estate after the costs of proceedings, fixed at eighty dollars, were paid, and that out of the balance he pay said sums of money due the creditors of said infants and Catharine Coats,

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amounting to said sum of \$979.61, and such accrued interest as might be found due as the same were set forth in said report of said McLean, and take receipts therefor from each person, and that he file the same with his report; that the sum of \$239.07, reported as being due to said Harmon Howland from the estate of said Horace Coats, deceased, be deducted from the shares of said infants, and that the remaining sum of money, after deducting the costs and expenses and the payment of said sum so reported by said referee, except the sum of \$239.07, one-third part thereof be invested in bond and mortgage upon unincumbered real estate affording ample security at times for the same during the lifetime of said Catharine Coats, paying interest annually thereof to her during her lifetime, and at her decease the principal sum thereof to be paid in equal portions to said infants, their heirs or assigns, and the remainder to be securely invested on bond and mortgage for benefit of said infants, &c. The said Catharine Coats to receive no benefit of said order until she should execute and deliver to said Moses Coates a sufficient release of all her dower interest in the lands and premises described in the petition.

A deed bearing date February 15, 1856, between special guardian for said infants, reciting the proceedings theretofore had, and containing a recital that said Catharine Coats joined in the same for the purpose of releasing her dower interest in the premises, was executed by such special guardian on the 31st day of March, 1856. She did not execute it until the 20th day of February, 1857, having up to that time failed to do it. On the 1st day of April, 1857, said Moses Coats executed a bond and mortgage to secure \$1,700 of said purchase-money.

On the 1st day of July, 1857, said special guardian made his report, showing that the deed had been executed by him for the infants at the time aforesaid, and that said Moses Coats was ready to perform his part of the agreement, but that said Catharine had failed to execute the same, or to sur-

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render the possession of said premises to Moses Coats until the 1st day of April, 1857, and that she had joined in the execution of said deed a short time prior to said 1st of April, 1857, and that said Moses Coats, on the 1st day of April, 1857, in pursuance of said agreement, had paid him in cash the sum of \$1,500 on said premises, and, on the same day, had executed his bond and mortgage to secure the payment of the remaining sum of \$1,700, in pursuance of said agreement, and that of said sum of \$1,700, the sum of \$651.67 the said Catharine Coats was entitled to the annual interest thereon during her lifetime, and that out of the money so paid to him by said Moses Coats he had paid the costs and the several amounts to individuals, as directed by said order, and that he had taken their receipts therefor, which were annexed to his report and forming a part thereof, amounting in the whole to the sum of \$1,403.31; that he had disposed of the balance as stated therein, which is not material here to recite.

Among said receipts attached to said report is one in the following words and figures, to wit:

“OTSEGO COUNTY COURT.

“In the matter of the petition of JANE L. COATS and ALTHERA COATS, infants, and CATHARINE COATS, their mother.	} \$21.47.
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“Received of William Marks, special guardian for the above-named infants, twenty-one dollars and forty-seven cents, in full for the amount directed to be paid by him to me, by an order of this court, bearing date the 11th day of February, 1856. Dated April 1, 1857.

“(Sd.) WM. DUFFIN.”

On the 7th day of July, 1857, an order was made by said court confirming in all things said report of said special guardian. It is not pretended in the case that the William Duffin, the plaintiff in the judgment upon which Moak was appointed

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receiver, is not the same William Duffin who gave the receipt for the twenty-one dollars and forty-seven cents to the special guardian of said infants. It appears from the case that no demand was made of the defendant for possession of the part of the premises assigned as Mrs. Coats' dower until the 30th day of August, 1857. The action was not commenced until as late as October 20, 1857.

There is no evidence or an intimation given in the case that Moses Coats knew of any of the proceedings on the judgment of Duffin against Catharine Coats, or of any of the proceedings before the surrogate with reference to Catharine Coats' dower interest, until after he had paid his money and taken the deed. Mr. Moak, the receiver, was simply the representative of Duffin, and he was bound by the acts of Duffin. We have a right to presume, that as early as between the 11th day of July, 1855, and the 5th day of February, 1856, Duffin knew of the proceedings for the sale of the real estate. No money had then been parted with by defendant Moses Coats; and none was parted with by him, for the real estate until the 1st day of April, 1857, notwithstanding such knowledge on the part of Duffin with reference to said proceedings for the sale of the real estate, including therein the dower interest of Mrs. Coats, he laid quietly by, and on the 1st day of April, 1857, fully ratified it. I have said that we have a right to presume Duffin knew of the proceedings at some time between July 11, 1855, and the 5th day of February, 1856. I conclude so from the fact that his claim, proven before the referee, was proven within that time, and the presumption is that he proved it himself. There is no evidence or statement in the case showing that he did not. The presumption that he did know of it is further strengthened by the receipt of the money by him and his giving his receipt therefor on the 1st day of April, 1857, and in which the proceedings are referred to. By the acceptance of that money from the special guardian he accepted a portion of the proceeds of her right of dower, for she bore the payment of that claim, with

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others, with the infants, and her share of the debts thus paid was paid out of the proceeds of her dower interest, with full knowledge of that fact. We must assume Duffin went before the referee, McLean, and proved his claim of nineteen dollars and sixty-seven cents and interest, for the purpose of enabling him to get a portion of the money paid by Moses Coats for such dower interest of Mrs. Coats. He took the money without disclosing the fact that he, through the receiver, claimed any interest in what had produced it. The taking of it was as fatal to the rights of the receiver as if the receiver himself had received a portion of it on the debt represented by him. His acts were the acts of the receiver for all intents and purposes in the matter, as the receiver was simply his representative for the collection of the judgment.

Did he, Duffin, not, by his own act in receiving the twenty-one dollars and forty-seven cents, as he did, fully ratify the sale by her of her dower interest, and her release thereof to Moses Coats? I think he did, pretty effectually, too. It did not lie with him to stand by silently and see Moses Coats pay his money for her dower interest, then go into court and get a part of it on a debt of his, without even questioning the legality of the sale producing it, and then, through his representative, the receiver, come into another court and say in that court that his representative, the receiver, was not bound by his, Duffin's, acts in the county court; that although he had taken a portion of the money of Moses Coats, under an order of the county court, he yet had the right to require him to surrender what he, Moses Coats, had paid for in good faith and he, Duffin, had shared in the proceeds of. It is not necessary to inquire whether the order of the county court was valid or not; Duffin was not in a position to question it. If he was not, the receiver was not.

If a party desires to avail himself of the benefit of such an order, and does do it, he must, and will in all courts, be held to thereby ratify the order in whole. He cannot ratify it in part, and disaffirm it in part. With such a state of facts in

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the case, I cannot believe the case was decided by the general term on the ground that a conveyance or an assignment was not executed of the dower right to the receiver, and that such was necessary. Supposing one had been executed and delivered, I undertake to say that the effect of such an act on the part of Duffin, upon the rights of the receiver, would have been the same, and been fatal to any such action as he, the receiver, might have brought against Moses Coats in relation to the same. But I am further confirmed in the position that the case was not decided on the ground of a want of conveyance or assignment to the receiver, from the fact that, following in the opinion of CAMPBELL, J., after what I have quoted on the subject, is the statement that he "thinks" there should be judgment for the defendant upon the verdict, for the reason that the plaintiff failed to show title in himself, as against the defendant, a purchaser in good faith, without notice. The rights of the receiver, with reference to such dower interest, was, by Duffin, his principal, ratifying the sale of such dower interest, and its transformation, by the Otsego court, into a fund in that court, transferred from such real estate to said fund; and I think CAMPBELL, J., in saying the defendant, upon the verdict, should have a judgment, for the reason that the plaintiff failed to show title in himself, expressed the verdict of the court. His, Duffin's, title vanished when such transformation was occurring. Furthermore before her, Mrs. Coats', right to dower was assigned, whether it might be vested in her or the receiver, it was a mere chose in action (*Thompson agt. Fonda*, 4 *Paige Ch.*, 448; *Stewart agt. McMartin*, 5 *Barb.*, 438; *Green agt. Putnam*, 1 *Barb.*, 500). A chose in action is not real estate, but personal property (2 *Blackstone's Commentaries*, 389-397; 1 *Chitty's Pr.*, 99; 1 *Barb.*, 500); even then, under the rule that a conveyance is only necessary to transfer the title to real estate, such right to dower became vested in the receiver without a conveyance or assignment. After it was thus vested in the receiver, it would be absurd to say that after assignment,

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when it had merged into an interest in real estate, it was necessary for a conveyance or assignment to save a right, already vested in the receiver, from sliding back into the hands of the original party. If orders are susceptible of such relaxity, without fault on the part of the receiver or his principal, there ought to be some new fastener or supporter put on to them to save such result. I cannot subscribe to the doctrine that there is a possibility of such sliding back. Neither do I believe that the case of *Moak agt. Coats* is an authority for the necessity of a conveyance to vest the title to real estate in a receiver appointed in supplementary proceedings; besides, the language used by CAMPBELL, J., in putting forth the necessity of such conveyance or assignment, seems to be based upon the remarks of judge COMSTOCK, in the case of *Chautauque County Bank agt. Risley* (19 N. Y., 369). I fail to see how that opinion of judge COMSTOCK had any application as a precedent in the case of *Moak agt. Coats*. Judge COMSTOCK's remarks as to a conveyance or an assignment being necessary to vest the title of real estate in the receiver appointed by the court of chancery, or by the supreme court succeeding to its powers, has never been questioned, to my knowledge. The supreme court exercised such power under section 244 of the Code, which is silent as to how the title is acquired by the receiver appointed under it.

Now we come down to a consideration of section 298 of the Code of Procedure, under which the receiver in this case was appointed, and see what we can discover there. That section commences with the declaration that "the judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner; and with the like authority, as if the appointment was made by the court, according to section 244 of the Code," that is, by a written order, and the receiver shall have like authority over the property which he becomes possessed of as such receiver, as a receiver appointed by the court under section 244 of the Code would have. That portion cited of section 298 of the Code, does not assume to

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say that the receiver appointed under that section shall become possessed of the property of the judgment debtor, in the same manner that he would if he had been appointed by the court, under section 244 of the Code. So much for such omission. No succeeding portion of that subdivision of said section has any reference to the manner in which the title to the real property of the judgment debtor is acquired by the receiver.

Now we come down to the next subdivision of that section (298). That provides, among other things, that, whenever the judge shall grant an order for the appointment of the receiver, &c., the same shall be filed in the office of the clerk of the county where the judgment roll is filed, or a transcript from justice's judgment, upon which the proceedings are taken, is filed; and the clerk shall record the order, in a book to be kept for that purpose, in his office, &c. Then the section says: "A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor, from the time of the filing and recording of the order aforesaid." No rule of court, decision or statute, that I am aware of, ever required the delivery of a certified copy of the order to a receiver appointed by the court. Neither do I know of any statute which declared or declares that upon his (the receiver) receiving a certified copy of the order appointing him (by the court), he shall be vested with the property and effects of the judgment debtor as of the time of the filing and recording of said order, or that upon the order being filed and recorded, he shall become vested with the property and effects of the debtor. I fail to see how, prior to the passage of the remaining subdivision of section 298 aforesaid, the term "property," as used in the clause of the second subdivision of said section, 298, just quoted by me, could mean any thing but both the *real* and *personal* property of the debtor. The third subdivision thereof was added in 1863.

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Section 464 of the Code has been in existence in its present form since the adoption of the Code in 1848, and it says: "The word '*property*,' as used in this act, includes property *real* and *personal*." The words, "this act," found in said section, undoubtedly means chapter 379 of the Laws of New York, passed April 12, 1848, which chapter was our present Code of Procedure as first adopted. With that legislative meaning given the word "property," as used in section 298, I am unable to see how, prior to 1863, any court or judicial officer could draw any distinction between the manner of acquiring title to real estate and that of personal estate by receivers appointed in proceedings supplemental to execution. I do not think section 298 of the Code contemplated any distinction in that respect. The statute, as it thus stood prior to the adoption of said amendment in 1863, was, it is true, open to the criticism visited upon it by CAMPBELL, J., in his opinion in *Moak agt. Coats (ante)*. But, conceding that, laws enacted by the legislature, though dangerous in their provisions if within the pale of the Constitution, are not to be repealed, nullified or modified by the courts or judicial officers; that privilege and duty rests with the legislative branches of the state, and not with the judicial branch thereof. By the adoption of said amendment of 1863, the legislature, in the exercise of its powers, removed the dangerous part of said section referred to by CAMPBELL, J., as aforesaid, by its declaring that before the receiver shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the clerk's office of the county where the real estate of the judgment debtor is situated, if situated outside of the county where the judgment roll and the original order appointing such receiver was filed and recorded, and also in the office of the clerk of the county where the judgment debtor resides, if residing out of the county where said original order was filed and recorded. The last clause of said subdivision has been construed by the supreme court at special term in this district by MERWIN, J., as requiring the

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filing and recording of a certified copy of order only where debtor or land was situated outside of county where the original order appointing receiver was filed and recorded, and which construction of the same, I cheerfully accept as the true construction thereof. If the law contemplated a conveyance or assignment necessary to vest the property in the receiver, why did not the section provide for a record of such conveyance or assignment in such places, instead of a record of such order and the certified copies thereof? I think I have already fully answered the question. I have conversed with both judges MERWIN and HARDIN on the subject of the necessity of such conveyance or assignment to a receiver of the real estate of the judgment debtor to vest the same in the receiver. They both expressed themselves to me as clear that no conveyance or assignment is necessary for that purpose, and that the appointment, filing and recording of the order, giving the requisite bond, having the same duly approved and obtaining a certified copy of the order, vested the receiver with the title of the real estate of the judgment debtor found in the county where the judgment roll was filed, provided the judgment debtor then resided there; if he did not reside there or the land was in another county, or both, then, by also filing a certified copy of such order in the clerk's office of the county where the real estate was situated and in the county where judgment debtor then resided. I find on examination (33 *How. Pr. R.*, 618) that the case of *Moak agt. Coats (ante)* was appealed to court of appeals and judgment rendered by general term, as shown by 33 Barbour, 498, affirmed by the court of appeals. Upon inquiry of the reporter of the court of appeals, I find that no written opinion was given by the court of appeals in the case. In the absence of such written opinion I must assume the court of appeals affirmed the judgment on the ground suggested by me, or at least on some ground other than that a conveyance or assignment was necessary. As this question does not seem to have been

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fully settled by any reported case, I must deny the motion, without costs.

Motion denied without costs.

Since writing the foregoing opinion, the case of *Cooney* agt. *Cooney* (65 Barb., 524) has fallen under my observation. The opinion is given by HARDIN, J., and in that opinion he says, though *obiter*, that an assignment or conveyance is not necessary to vest the title to real estate in the receiver appointed in supplementary proceedings.

Seabury agt. Grosvenor.

UNITED STATES CIRCUIT COURT.

SEABURY & JOHNSON agt. JOHN M. GROSVENOR.

Trade-mark — Fraudulent representation.

Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, acquired by advertising their wares under representations which are false.

June, 1877.

THIS suit was brought by Seabury & Johnson, plaintiffs, for an injunction against John M. Grosvenor, for an alleged infringement of a trade-mark.

The alleged trade-mark was claimed by Seabury & Johnson to consist of the word "capcine," as used in their "Benson's Capcine Plasters." The evidence showed that, prior to commencing this suit, Seabury & Johnson had falsely represented, in their circulars accompanying their plasters, that they were made of "capcine," and that "capcine" was "a vegetable principle of great value, recently discovered by a celebrated chemist," &c., the truth being that there was, and is, no such word or substance as "capcine" in chemistry or medicine, or otherwise, while "capsicin," the word used by the defendant Grosvenor, is the name of a real substance well known in chemistry and medicine.

R. Cox, for plaintiffs.

J. W. Howe, for defendant.

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BLATCHFORD, J. — The evidence is clear that the plaintiffs were systematically and knowingly carrying on a fraudulent trade. Although they may have omitted the fraudulent and deceptive and untrue language from their circulars before this suit was commenced, yet if they have any property in the trade-mark which they claim title to, they acquired such property by the use, for a considerable time, of such language in the circulars which accompanied the articles they sold, and in respect to which the trade-mark is claimed. Such language was to the effect that "a celebrated chemist had recently discovered a vegetable principle of great value, and prior to making it generally known had introduced it into hospitals, and had generously extended its use to the most successful physicians; that the flattering and astonishing results which characterized its action, at once stamped it as the most remarkable principle ever discovered; that this powerful remedy was named capcine, and that it was used in plasters prepared by the plaintiffs, and called Benson's Capcine Plasters." A registered trade-mark is claimed in the word "capcine." Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark acquired by advertising their wares under such representations as those above cited, if they are false. It is shown that there is no such article as capcine known in chemistry or medicine, or otherwise. The authorities are clear that in a case of this description a plaintiff loses his right to claim the assistance of a court of equity (*Lee agt. Haley, L. R.*, 5 *Chy. App. Cas.*, 159; *Leather Cloth Co. agt. American Leather Cloth Co.*, 4 *De G., J. & S.*, 142).

The motion for an injunction is denied.

Grissler agt. Powers.

SUPREME COURT.

GOTLEIB GRISSLER and another agt. HOLLIS L. POWERS and
JOSEPH G. BROWNING.

Mortgage — sale thereof for less than its face — Estoppel — Trust — Creditors — Usury.

Where a mortgage was made without consideration, but was assigned by the mortgagee as a valid security to a *bona fide* purchaser for an amount less than its face, the purchaser relying upon the representations of the mortgagor and mortgagee that the mortgage had been issued for its full value,

Held, that the assignee, upon a sale by him of the mortgage for its face, was not a trustee for the mortgagor, nor his creditors, as to the difference between what he paid for the mortgage and the sum which he received upon its sale.

Schaffer agt. Reilly (50 N. Y., 61) and *Freeman agt. Auld* (44 *id.*, 50) distinguished.

Special Term, April, 1877.

BROWNING made a mortgage for \$20,000 to Stuyvesant, but the same, as between the parties, was without consideration. The mortgage was sold and assigned by Stuyvesant to Powers for the sum of \$16,600, it being represented to Powers at the time by both mortgagor and mortgagee, the mortgagor making an affidavit thereto, that the mortgage was an honest security, and that the amount had been actually received by the mortgagor as a consideration for the mortgage. Powers acted upon the representations and believed them.

Powers subsequently sold the mortgage for the full amount thereof, and assigned the same to the purchaser. The plain-

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tiff, a judgment creditor of Browning, his judgment being recovered after the transaction, claimed that Powers held the difference between what he paid for the mortgage and the sum which he received on its sale, as a trust for Browning and his creditors, and that it was liable to his debts.

John I. Townsend, for plaintiffs.

Gleason & Cator, for defendants.

VAN VORST, J. — I am referred to no case as a direct precedent for this action. I infer it is sought to be sustained as a corollary from what has been decided in other cases.

I am referred to *Schaffer agt. Reilly* (50 N. Y., 61). But an examination of that case shows that the person whose claim was preferred to the mortgage had an actual lien upon the mortgaged premises before the mortgage had validity.

But in the case under consideration the plaintiffs had no lien, legal or equitable, upon the mortgaged premises, or any property of Browning, before the 3d day of October, 1868, when defendant Powers purchased the mortgage, and it acquired validity.

Before that time plaintiffs had not even an acknowledged indebtedness against Browning. The notes, which are the foundation of his judgments, were not given until some time afterwards.

The case of *Freeman agt. Auld* (44 N. Y., 50) differs materially from the one we are considering, and gives no favor to the plaintiff's action. In that case there was a mortgage for \$4,000, \$2,000 was advanced by the Home Insurance Company, but a further loan of \$2,000 was contemplated; it had never, in fact, been made.

The mortgage conveyed the premises, subject to the mortgage, which the grantee agreed to pay. It was decided that the grantee, under his covenant, could be compelled to pay to the assignee of the mortgage the whole amount secured

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thereby ; but that the assignee would hold the balance over and above what the Home Insurance Company had advanced, as a trustee for the mortgagor, as unpaid purchase-money on the conveyance of the premises. There was good ground for characterizing the relation between the assignee, of the mortgage and the mortgagor as one of trust. The assignee, when he took the mortgage, knew that only \$2,000 had been advanced thereon by the Home Insurance Company. That is all he, in fact, himself gave for the mortgage ; he credited the balance to the mortgagor, and in the beginning placed himself in the attitude of a trustee, and that understandingly. But in the case we are now considering, the defendant Powers purchased the mortgage upon the understanding that it was a good and valid security for the whole amount thereof. He believed it was such.

The mortgagee professed to sell the entire security as one upon which the whole amount had been paid to the mortgagor. The mortgagor himself represented such to be the fact, and made an affidavit thereto. There could, therefore, as to him, be no resulting trust. If the security was valid, the assignee could sell and assign it at a discount from its face. The loss would fall upon him, and not upon the mortgagor. And, in view of the representations made at the time of the purchase and assignment thereof, the mortgage must be deemed to be such as it was represented to be — a good and valid security for the face thereof.

As between the mortgagor and the defendant Powers, there is no stable ground upon which a trust relation can rest. Upon his own statement, Browning had no interest whatever in the mortgage moneys. He had already received the same.

The plaintiffs' claim, as projected in the complaint, is, that the defendant Powers, from the time he acquired title to the bond and mortgage, held the same in trust for Browning, for the difference between what he paid for same, \$16,600, and \$20,000 which he received from the person to whom he afterwards assigned it.

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As far as Browning is concerned, I should conclude that he was estopped, by his declarations and affidavit, from asserting that Powers held the money in trust for him.

That a party is not to be heard who alleges things contradictory to each other is an elementary rule of logic, and is applied in courts of justice (*Broom's Legal Maxims*, 169).

A person is not to be allowed to shift his ground, by conflicting statements, according to what he conceives to be his interest. The rule is that where a person who, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time (*Pickard agt. Sears*, 6 A. & E., 469; *Nickells agt. Atherstone*, 10 Q. B., 949).

The evidence is uncontradicted that Powers, in purchasing the mortgage, which was a second incumbrance on the premises, acted on the representations of Browning, who should not be allowed to change his ground. If he could not, I know of no principle which will entitle the plaintiff, a subsequent creditor of Browning, to impress the quality of a trust upon these moneys in his favor.

There is nothing in evidence which leads to the conclusion that the scheme of Browning was projected to defraud his creditors, by creating fraudulent incumbrances on his property.

In the case of *Payne agt. Burnham* (62 N. Y., 69) it was held, in an action in equity to foreclose a mortgage which had been made without consideration, and was purchased from the mortgagee at a discount, that the assignee could recover only what he had paid for the mortgage. The defense of usury was interposed in the action by the mortgagor. It was held that the mortgagor was estopped from availing himself of the defense by an affidavit which he had made of the goodness of the mortgage.

It may well be that when a party goes into a court of equity to enforce a mortgage, and it appears that it was invalid

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in its inception, and had been negotiated at a usurious rate, that upon interposing the affidavit of the mortgagor, as an *estoppel in pais*, he should be limited to its use as an indemnity only.

I do not think it by any means follows from that case that Powers, having sold the mortgage for its face, holds the profit he made on the transaction, as a trustee for Browning. Such conclusion would be in opposition to the expressed intention of the parties: that Powers purchased and was entitled to the whole mortgage.

The plaintiffs' complaint makes no averment that the negotiation of the mortgage was an attempt to evade the usury laws.

Even in case of usury, the borrower must by action seek to recover the amount of the excess within one year. This transaction took place and the money was received by Powers in the year 1870 (*Palen agt. Johnson*, 50 *N. Y.*, 49).

The allegations in the plaintiffs' complaint, that Powers had notice of all the matters therein alleged at the time he took the mortgage, are not proven. If they had been, the trust would have been established, and the plaintiff entitled to recover; as it is, the proof does not make out a case for the plaintiff, and the complaint is dismissed.

Matter of Roberts.

COURT OF APPEALS.

IN THE MATTER OF ANDREW L. ROBERTS, an insolvent and imprisoned debtor.

Application for discharge of insolvent — To whom must be made — Non-resident judge — Res adjudicata — Appeal.

The application for the discharge of an imprisoned debtor, under the fifth article of title 1, chapter 5, part 2 of the Revised Statutes, must be made to certain *officers* specified, and cannot be made to any *court*; and an order by such officer is not appealable either to general term or to the court of appeals. The remedy is by *certiorari*.

The petitioner resided in the county of New York. The application was made to judge DONOHUE, one of the supreme court judges of this county, who made the order for publication July 20, 1876, and to show cause September 2, 1876. On the return day, September 20, 1876 (Saturday) counsel for parties attended, but neither judge DONOHUE nor any other justice was present, and no adjournment was had of the proceedings. On Monday, September 4, 1876, judge WESTBROOK, who was duly assigned to duty in this county, on application of counsel for the petitioner, granted an adjournment until September eight, subject to any objections by opposing creditors that could be taken that day. Two other adjournments were had by the same judge.

Held, that judge WESTBROOK was not, in the sense of the statute, successor of judge DONOHUE, and he lacked the qualification of residence. Under the positive provisions of the statutes, he had no jurisdiction, and the proceedings were out of court.

It seems, the doctrine of *res adjudicata* applies to these proceedings.

May Term, 1877.

THIS is an appeal from an order affirming the order denying the application of the petitioner for his discharge from imprisonment.

The application was made under article 5, title 1, chapter

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5 of part 2 of the Revised statutes (*See vol. 2, R. S., p. 29 of Edmonds' ed.*).

The order for publication was made July 20, 1876, and to show cause September 2, 1876.

On the return day, September 2, 1876 (Saturday), counsel for the respective parties attended, but neither justice DONOHUE nor any other justice was present, and no adjournment was had of the proceedings.

Objections were filed by the counsel for opposing creditors, as by law provided.

On Monday, September 4, 1876, justice WESTBROOK was in attendance at Chambers, and counsel for the petitioner applied for and obtained an adjournment until September eight, *subject to any objections by opposing creditors that could be taken that day.*

A like adjournment was had until the fifteenth of September, and again until the first Monday of October, 1876, by justice WESTBROOK, and a special objection was taken to his power so to do.

Various adjournments were had, at request of counsel for petitioner, from time to time, upon like conditions as before, until January 27, 1877, when the papers were submitted to justice DONOHUE, who afterward denied the application, and the order was duly entered, from which an appeal was taken, and said order was affirmed by the general term, and from the order of affirmance this appeal is taken.

The general term affirmed the order, upon the ground that the doctrine of *res adjudicata* is applicable to these proceedings (*See opinion of general term, 10 Hun, 253*).

Vedder Van Dyck, counsel for petitioner and appellant, argued the following points among others:

I. Petitioner appealed to general term, upon the ground that the officer below, in denying his application, erred, because there was no evidence to support the decision upon which the order was based. 1. The practice upon these

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applications is, that the creditor opposing the discharge must, at or before the first hearing on the petition, file a specification, in writing, of the grounds of his objections (*See sec. 5 of said article, 3 R. S. [6 Banks' ed.], 24*). The statute does not provide, nor is there any necessity for a traverse, demurrer or reply, on the part of petitioner, to such specifications. For the opposing creditor then, at said hearing, becomes entitled upon demand, to a trial of the merits of the application, and may require an examination of petitioner, his wife and others. In this instance the creditors neglected to demand such trial and examination, but rested upon the proofs and allegations submitted. 2. All the substantive facts required by the statute to make out a *prima facie* case for discharge appear in petitioner's petition, and accompanying schedules and affidavits. The specifications put all those facts in issue. But the proofs offered by creditors do not controvert any of petitioner's allegations, nor do they sustain any of the objections going to the merits of the application, but relate merely to the publication of the notices and to certain proceedings at a special term of the court of common pleas, neither of which touch or sustain the point upon which said officer denied the application. Therefore all substantive facts entitling petitioner to his discharge upon the merits, under section 8 of said article, being admitted by creditors on the hearing, the assignment provided by said section ought to have been directed. 3. The denial of petitioner's application, by the officer below, in view of the proof, seems to have been solely upon the ground of a supposed want of power to grant the relief sought, because of a decision of general term (*in Matter of Brady, reported in 8 Hun, 437*), which he considered himself constrained to follow. Petitioner submits that no comparison between this and *Brady's Case* is warranted in fact or in reason, and that the officer below must have denied this application only upon a misconstruction of the opinion in said case. It there appeared that Brady had been guilty of one of the acts which he was required by the

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statute to negative in his oath. For this act he had been arrested; and the general term held, upon his application for discharge, under article 6, that such act, although consummated before the action, if it were so connected with the action as to be the ground of arrest therein, made his proceedings not "just and fair" under said article, and prevented his discharge. This decision of general term has since been affirmed, of course, by this court of appeals (*See ante*, p. 128). Now, on this application, the allegations in the petition, schedules and affidavits, conforming in every respect to the requirements of article 5, stand unimpeached and uncontradicted by any proof. And there is no suggestion in the decision in said *Brady's Case* which could restrain the officer from directing the assignment to be made under section 8. There was thus an utter failure of proof as to objections 1, 2, 3, 5, 6, 7, 8, 9, 10, 13 and 14.

II. General term, disregarding the opinion of the officer below, affirmed his order upon objection 13 in the specifications, that this application is *res adjudicata*. Petitioner submits that this was error, for the following reasons: 1. There was no evidence to sustain this objection. It is elementary law that to establish said objection it must appear that the former decision was in a matter between the same parties, that it was upon the same state of facts and upon the merits. And such decision being before an officer of special jurisdiction under the statute, the creditors were also bound to establish, on the hearing, the facts conferring jurisdiction. The burden of proof as to these matters was upon the creditors (*Kerr agt. Hays*, 35 *N. Y.*, 331; *Lawrence agt. Hunt*, 10 *Wend.*, 80; *Code*, sec. 161). (a) The order was not proof. It does not recite jurisdictional facts; on the contrary, it purports to be an order of a special term of a court of common pleas, incompetent to entertain an application under article 5, and not an order of an officer under the statute, as required. (b) It does not show that said application was between the same parties as this. (c) It does not recite or

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show the grounds or facts upon which the former application was denied, whether upon the merits or not. (d) The records of the former proceeding, upon which creditors rely, ought to have been produced (1 *Gr. Ev.*, sec. 511). And their omission to produce it, without proof of inability, creates an unfavorable presumption against them. (e) When the record, having been produced, does not show upon its face that the point was decided, but was a proper issue, and might have been decided, then only is evidence *abunde* competent (*Kerr* agt. *Hayes*, 35 *N. Y.*, 331). The record not having been produced, the affidavit is incompetent. (f) The affidavit is also insufficient. It fails to allege that this application is upon the same state of facts as the former one, or between the same parties. The statement contained in said affidavit, that said petition was "like the petition now presented," that said decision was "upon the merits," and that the schedule "is substantially the same as in said prior application," are merely matters of opinion, not facts upon which said objection could be sustained. 2. Even if the proofs were sufficient *prima facie* evidence to support said objection, petitioner submits that he has had no opportunity to controvert them. It was not raised upon a motion to dismiss the petition, so that petitioner could come in with counter-affidavits. Having been raised upon the hearing, petitioner has no right or opportunity, under the statute, to offer affidavits in opposition to said objection or in support of his petition. Said objection being so raised at the hearing becomes one of the issues to be determined only by the examination, wherein petitioner would have an opportunity to rebut it. Since petitioner cannot insist that he be examined, creditors, by not demanding such examination, have virtually closed the door to his proofs, however conclusive, that his present application is upon a different state of facts. 3. The doctrine of *res adjudicata* is not applicable to a proceeding under article 5. The maxim, "*nemo debet bis vexari pro eadem causa*," upon which the doctrine is founded, suggests its limitations. The

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respective rights of the same parties having been duly and finally determined upon the merits, the successful party has a right to rest upon such determination, without further vexation from the unsuccessful party. So the doctrine is applicable to all determinations as to rights of the same parties to property, whether in actions or summary or special proceedings (*Demarest* agt. *Day*, 32 *N. Y.*, 281, and other cases cited in the opinion of general term). So in *habeas corpus* cases, where the right to custody of a child as between contending parents is determined (*Mercein* agt. *People*, 25 *Wend.*, 64). So the doctrine clearly applies in a case like that of *People ex rel. Lockwood* agt. *Aiken* (4 *Hill*, 606). The relator was arrested on warrant under the non-imprisonment act, upon the ground that he had property or rights in action which he fraudulently concealed, or had assigned, removed or disposed of his property with intent to defraud his creditors. Relator neglected or refused to controvert said charges. To prevent a commitment he proposed to make an assignment of his property under act. Upon this application the commissioner decided, after a hearing, that his proceedings were not just and fair and that he had concealed his property, &c. The commitment was thereupon issued. Then, in the same matter, he applied to judge *AKIN*, under the same act, for his discharge, and the judge, on motion, dismissed the application, upon the ground of the former adjudication. The decision was properly affirmed by the court of errors. The plaintiff's right to the arrest of the defendant had been determined in the very matter between the same parties, and under the very statute by whose provisions relator sought again to be released. So, too, the doctrine has been applied at special term at common pleas, upon a second application under the fourteen-day act (*article 6*), for there the application is made in the suit in which the petitioner is arrested and the opposing creditor is the plaintiff in such suit. The determination is necessarily between the same parties (*Matter of Rosenberg*, 10 *Abb. [N. S.]*, 450;

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Matter of Thomas, id., 114). But an application under article 5, such as the present one, is altogether different from the foregoing instances where the doctrine has been applied. The article was enacted for the relief of debtors imprisoned, or liable to imprisonment, exempting them, in certain cases, from such liability, or, if imprisoned, discharging them as to all creditors. Proceedings under the article, therefore, being intended to secure or procure a debtor's liberty, are, in all respects, except in form, analogous to proceedings under the *habeas corpus* act; and the law applicable to such proceedings should be applied to these under article 5. It is now well settled in this state that previous adjudications are no answer to a new writ where the relator is restrained of his liberty. The decision under one writ refusing to discharge him does not bar the issuing of a second writ by another court or officer (*People ex rel. Lawrence agt. Brady*, 56 *N. Y.*, 182; *Ex parte Kaine*, 3 *Blatch. C. C.*, 1; *Ex parte Partington*, 13 *M. & W.*, 679; *The King agt. Sallis*, 1 *East*, 306; *In re Reynolds*, 6 *Park. Cr.*, 276). In such cases the argument of inconvenience or vexation must yield to the right of a person to his liberty. "Any system of law which would keep a prisoner in custody when the facts show him to be entitled to his discharge, would be a perversion of justice" (*People ex rel. Eldridge agt. Fancher*, 3 *S. C. Rep.*, 189).

III. Objection 15 refers to the adjournment had upon order of Mr. justice WESTBROOK. It seems to be intended by the statute merely to restrict the insolvent to proceeding within the county in which he resides or is imprisoned. The proof of residence or imprisonment referred to applies to the insolvent, not the officer. Hence the application must be made primarily to an officer residing within the same county (*See sec. 2, art. 7, 3 R. S. [6 Banks' ed.]*). Therefore, section 3 provides that a collusive imprisonment in a county different from that of his residence will avoid a discharge, or defeat the application; and section 4 provides that if there

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be no such officer residing in any such county, the application may be made to any such officer residing in any other county. "But no place shall be appointed for the hearing on any application out of the county in which the insolvent resides or is imprisoned." And section 5 goes farther, providing that in certain cases the proceedings may be continued by the successor in office of the officer before whom the proceeding began, or by any other officer residing in the same county who might have originally instituted such proceedings, in the same manner and with the like effect as if originally commenced before him." There seems to be thus no limitation as to the competency of the "successor in office," wherever his residence, provided he proceeds with the hearing in the county wherein the insolvent resides or is imprisoned. Judicial cognizance must be taken of the fact that judge WESTBROOK was duly assigned to duty in this county at said time, and was, therefore, the successor in office of any resident justice in this proceeding. No proof was offered that any other justice of this court or other officer was present in this county. The competency of said justice as an officer depends upon existing laws (3 *R. S.* [6 *Banks' ed.*], 221, *sec.* 92; *id.*, 223, *sec.* 98; *id.*, 446. *sec.* 40; *Code*, *sec.* 27; *id.*, *sec.* 404). The provision is remedial in its nature and should be liberally construed to effectuate the object intended. The object was to provide for the continuance of the proceedings (*Holstein agt. Rice*, 24 *How.*, 140). As to objection 16, petitioner submits that his proceeding on the next court day is according to the practice in the first department (*Mathis agt. Vail*, 10 *How.*, 458). There is no proof that creditors or any one interested were misled or injured. The only creditors who appeared on the return day appeared on the next court day, and thereafter at the hearing herein (*Matter of Jacobs*, 12 *Abb.* [*N. S.*], 273). As said creditors so appeared, it was not necessary that further notice be given them under section 42, 3 Revised Statutes (*Banks' 6th ed.*), 447. If such proceedings were irregular, it was waived by creditor's

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subsequent appearance and action (*Mahany* agt. *Penman*, 4 *Duer*, 603; *Sullivan* agt. *Frazer*, 4 *Robt.*, 516).

IV. The order appealed from should be reversed with costs, and the officer below required to direct an assignment of petitioner's property under section 8 of the act.

Arnold, Elliott & White, attorneys. *R. C. Elliott*, of counsel for opposing creditors, argued the following, among other points:

I. The proceedings were out of court. They were returnable September 2, 1876. Neither the justice granting the order was present nor was any other justice present, and no adjournment was had. These proceedings being statutory, the provision of the statute must be strictly complied with (*People ex rel. Galston* agt. *Brooks*, 40 *How.*, 165; *People ex rel. Lewis* agt. *Daly*, 4 *Hun*, 641).

II. If the provision of the Code could assist the petitioner, which we hold they cannot, then we say they do not provide for this case. They are as follows: Code, § 26. "In case of the inability for any cause of a judge assigned for that purpose to hold a special term or circuit court, or sit at a general term, or preside at a court of oyer and terminer, any other judge may do so." If this section did apply, our answer would be that any other judge did not do so, and if he had, it must be a judge competent to institute it (*See Dresser* agt. *Van Pelt*, hereafter cited). Code, § 27, subdivision 1: "Every proceeding commenced before one of the judges in the first judicial district may be continued before another with the same effect as if commenced before him." Again we say, but it was not so continued. A true interpretation of this section is a proceeding commenced in the first judicial district by any judge competent to institute it therein may be continued in such district before any judge competent to have commenced it (*Dresser* agt. *Van Pelt*, 15 *How. Pr.*, 19). Code, § 404, provides: "When notice of a motion is given, or an order to show cause is returnable before a judge out of

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court, and at the time fixed for the motion he is absent, or unable to hear it, the same may be transferred, by his order, to some other judge before whom the motion might originally have been made." The remarks made to the section before stated apply with equal force to this section.

III. Under the statute, application must be made to an officer residing in the county in which the debtor resides, and proof of such residence must be made at the time of presenting the petition and before any order will be granted (*Art. 7, title 1, part 2, chap. 5 of the R. S.*; 2 *R. S.*, 35, § 2 [*Banks' 5th ed.*], *vol. 3, p. 109*). And sections 4, 5 and 6 provide for the inability to proceed before the officer mentioned in section 2; those sections are, in substance, as follows: Section 4. "If no officer residing within the county, &c., then the application can be made to any such officer residing in any other county," &c. Section 5. "In case of death, sickness, resignation removal from office, absence from the county of his residence, or other disability of any officer before whom proceedings under the statute may have been commenced, the proceedings may be continued by his successor in office, or by any other officer residing in the same county *who might have originally instituted such proceedings*, in the same manner, and with like effect as if originally commenced before him." Section 6. "If there be no officer in the same county competent to continue such proceedings, then any judge of the county court may attend at the time and place appointed for the hearing of any matter, and may adjourn the same to the next county court or court of common pleas, to be held in the county, &c., and said court shall proceed therein in the same manner and with like authority as the officer who commenced such proceedings." The statute provides (2 *R. S.*, 277 [*Banks' 5th ed.*], *vol. 3, p. 469*) as follows: Section 2. No process, civil or criminal, before any of the said courts, shall be discontinued by the occurrence of any vacancy in the office of any judge, or of all the judges," &c. Section 3. "No process issued or proceed-

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ings pending shall be discontinued by reason of such court not having been held at any stated term thereof, but such process shall be deemed to be returnable at the term which shall be held next after such failure, and shall be continued at such term in the same manner as might have been at the term which failed, upon the like notice as would have been required for such term."

IV. If it should be held that the proceedings stood over from September second to September fourth, we then say the justice in attendance on that day had not the power to hear or to adjourn. He was not a resident of the county, and not an officer to whom the petition could have been presented, and who could have granted the order, and he does not come within the provision of the sections before stated.

V. Questions of jurisdiction in these proceedings can be raised at any time (*Matter of Wigby*, 8 *Wend.*, 134; *People ex rel. Galston* agt. *Brooks*, 40 *How. Pr. R.*, 165; *People ex rel. Lewis* agt. *Daly*, 4 *Hun*, 641).

VI. The application was properly denied; the petitioner had before applied, under the same statute, to a judge of the court of common pleas for the city and county of New York, for their discharge, issue was duly joined under such application, a trial was had, and, after a full hearing, the application was denied upon the merits, an order was duly entered, no appeal was taken from said order, no application has been made to open those proceedings, or for leave to amend. The doctrine of *res adjudicata* applies. The petitioner should have either moved to open those proceedings and for leave to amend the same, or have appealed from the order as entered, or by writ of *certiorari*, have removed those proceedings to the supreme court for examination and review. Act of 1854 (*Laws of 1854*, 592, *chap.* 270) provides for appeal to the general term from any judgment or order in any special proceedings (*Matter of Livingston*, 34 *N. Y.*, 557.) *Certiorari* will issue to remove to the supreme court for examination and review (2 *R. S.*, 49, 50, § 47; *Laws of 1874*,

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chap. 280, § 17; *Gardner* agt. *Commissioners*, 10 *How. Pr. R.*, 181; *People ex rel. Lewis* agt *J. F. Daly*, 4 *Hun*, 641; *Morewood* agt. *Hollister*, 6 *N. Y.*, 309). That the principle of *res adjudicata* applies in these cases, see *Demarest* agt. *Day* (32 *N. Y.*, 281); *White* agt. *Coatsworth* (6 *id.*, 137); *Yonkers and N. Y. F. I Co.* agt. *Bishop* (1 *Daly*, 449); *Powers* agt. *Witty* (42 *How. Pr. R.*, 352); *People ex rel. Lockwood* agt. *Akin* (4 *Hill*, 606). The same principle applies in cases of *habeas corpus* (*Mercein* agt. *People*, 25 *Wend.*, 64; *People* agt. *Burnett*, 13 *Abb. Pr. R.*, 8; *People* agt. *Kelly*, 1 *Abb. Pr. [N. S.]*, 432). In case of *Brown* agt. *Mayor of New York*, in the court of appeals, June 13, 1876 (reported in *Weekly Digest of September 11, 1876*, volume 3, number 5, page 119), held the rule of *res adjudicata* applies not only to judgments, but to all judicial proceedings, whether made in actions, or summary or special proceedings, or by a judicial officer, in matters properly submitted to their determination. The cases of *Matter of Rosenberg* (10 *Abb. Pr. [N. S.]*) and of *Matter of Thomas* (10 *Abb. Pr. R. [N. S.]*, 114), are directly in point. If the debtor can make a second application, after being defeated in the first, there can be no limit to the application, and the creditor may better abandon his claim at once than think of opposing a discharge (*Per BRONSON, J.*, in *People* agt *Allen*, 4 *Hill*, 608). And if the counsel ask, how can the debtor get out of jail? we would reply in the language of the same justice in the same case: "That is a question we are not now called upon to decide," and, in this particular case, would add that the community at large are safer with the petitioner where he is, than were he successful in his application.

VII. It appears, upon the face of the papers presented by the petitioner, that he is not entitled to his discharge; the test is, are the statements *just and true, and is the affidavit presented true?* It appears, from the schedule, that there are claims against the petitioner amounting to over \$200,000 for money had and received by him, with others, from various

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parties, and that two of said claims have passed to judgments, one for \$36,064.09, May 4, 1875, and one for \$91,015.35, January 8, 1876, these two claims alone amounting to over \$127,000, the petitioner, with others, has had and received, yet he does not account for a single dollar of it.

VIII. The petitioner was not entitled to his discharge upon the papers, as they were submitted to the justice below within the spirit of the decision. The act was created for the benefit of poor but unfortunate debtors, not for the relief of the fraudulent debtor, and the application at that stage of the proceeding was properly denied (*Matter of Watson*, 2 *E. D. S.*, 429; *Gaul* agt. *Clark*, *N. Y. W. D.*, vol. 1, p. 209; *In re Walter Brady*, 8 *Hun*, 437; *Matter of Pie*, 10 *Abb. Pr.*, 409; *People* agt. *White*, 14 *How. P. R.*, 499).

The order should be affirmed.

PER CURIAM.—This was an application under the fifth article of title 1, chapter 5, part 2 of the Revised Statutes for the purpose of exonerating the person of the petitioner from imprisonment. There are two objections not involving the merits, which we do not see any way to overcome:

First. The application must be made to certain officers specified, and cannot be made to any court, and an order by such a person is not appealable either to general term or to this court. In the *Brady Case* (*ante*, p. 128) the application was under the sixth article, which authorizes it to be made to a court, and we held that it was appealable as an order in a special proceeding under the act of 1854, chapter 270. The remedy in this case was by *certiorari*.

Second. The case was out of court by the failure of the presence of a judge competent to act. Section 2, article 7, provides that applications under the fifth article must be made to an officer *residing* in the county in which the insolvent or imprisoned debtor reside or is imprisoned; and section 5 provides that in case of disability, resignation, removal from office, or absence from the county, of the officer before whom the proceedings were commenced, the same may be continued

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by his successor in office, or by another officer who might have originally instituted such proceedings; and the sixth section provides that if there is no such officer competent to act, then any judge of the county court may attend and adjourn the hearing to the next court of common pleas of the county.

The original order was made on the 20th day of July, 1876, by justice DONOHUE, returnable on the 2d day of September, 1876. On the return day the parties appeared, but there was no justice in attendance. On the fourth day of September, which was Monday, the next court day, justice WESTBROOK adjourned the proceedings until the eighth day of September, and on that day he adjourned them until the first Monday of October. Justice WESTBROOK neither resided in the county or the district.

The statute is very specific in designating the officers who are authorized to act in conducting these proceedings.

It must be an officer residing in the same county in which the debtor resides or is imprisoned, and this qualification every justice must have or the proceedings go to the common pleas, except that the successor of the officer who made the original order may act.

Judge WESTBROOK was not, in the sense of the statute, successor of judge DONOHUE, and he lacked the qualification of residence. Objection was duly taken throughout the proceedings, and we feel constrained to hold under the positive provisions of the statutes that justice WESTBROOK had no jurisdiction, and that the proceedings were out of court. There was no judge present on the return day, and no one competent to act until the second day of October.

The proceedings could not be reviewed at that time, and the subsequent proceedings were.

The question of *res adjudicata* is a more serious one, but it is not necessary to consider it.

The order of general term reversed and appeal to that court dismissed.

All concur.

Congregation Shaarai Tephila agt. Mayor, &c.

NEW YORK SUPREME COURT.

THE CONGREGATION SHAAARAI TEPHILA agt. THE MAYOR,
ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK
and JOHN PETERKIN.

Church buildings exempt from taxation — relief in equity from tax — extrinsic facts.

Certain lands of the plaintiff with the buildings thereon, were, by statute, exempt from taxation, the same being used exclusively for public worship,

Held, that the plaintiff could maintain an action in equity to set aside a tax imposed thereon, and a sale made for its non-payment, no deed having been executed to the purchaser, the invalidity of the tax not appearing on the face of the assessment, but required to be established by extrinsic facts.

Special Term, December, 1874.

VAN VORST, J. — The plaintiff is a religious society duly incorporated under the laws of the state of New York, and is the owner in fee of certain premises situated in the city of New York. The plaintiff purchased the land in question in December, 1866, for the purpose of erecting thereon a building for public worship.

In the year 1867 the erection of the building was commenced and was continued, without intermission, until its completion in 1868. The building erected on the land in question has always been exclusively used for public worship, and is, exclusively with the land, the property of the plaintiff.

In the year 1868 the defendants The Mayor, Aldermen and Commonalty of the City of New York levied and assessed upon the premises a tax for that year, amounting to the sum of \$478.80.

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On the 23d day of December, 1871, the premises were sold at public auction by the defendants The Mayor, Aldermen and Commonalty of the City of New York for non-payment of the tax. At the sale the premises were purchased by the defendant Peterkin for the sum of \$673, and certificates of such sale were delivered to Peterkin and a memorandum thereof was filed in the bureau of arrears, in the department of finance of the city and county of New York, and entered in a book kept by the clerk, where notes and certificates of sales of land for taxes are entered.

By virtue of the certificates the defendant Peterkin claims that he is entitled to receive from The Mayor, Aldermen and Commonalty of the City of New York a lease, or leases, of the premises for the period mentioned in the certificates, 1,000 years, but no lease has yet been executed to him.

Peterkin has been requested by the plaintiff to cancel the certificates or release his rights thereunder, but has refused so to do.

The plaintiff was ignorant of the fact that any assessment for taxes for the year 1868 had been levied on the property, and was also ignorant of the fact that the premises had been sold for non-payment of said taxes until more than one year subsequent to the sale.

The plaintiff has applied to the comptroller of the city of New York, by petition, setting up the facts last above mentioned, and others deemed material, that said sale be vacated and set aside and the premises relieved from the tax, but the application has been denied and the defendants The Mayor, Aldermen and Commonalty of the City of New York are about to make a conveyance of the premises to Peterkin for the term of 1,000 years.. The above facts, with others, appear by the plaintiff's complaint.

The plaintiff claims that the tax under which the premises were sold was not legally made or confirmed, and that the proceedings in respect to laying and imposing the same, and the confirmation thereof, are illegal and void.

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That the plaintiff was exempt, by and under the provisions of the statute of the State of New York, in such case made and provided, from the payment of taxes, and that the property was exempt from taxation.

That by reason of the execution of the certificate of sale, and of the filing and entry of a memorandum thereof in the office of the clerk of arrears, they and each of them, is presumptively a lien upon said premises. That the certificate is a cloud upon plaintiff's title, and diminishes the value of the premises.

The plaintiff demands judgment that the defendants The Mayor, Aldermen and Commonalty of the City of New York be enjoined from executing or delivering any deed, lease, or other instrument of conveyance, to the defendant Peterkin, or his assigns or legal representatives, or any other person, pursuant to the sale. And that the defendant Peterkin be enjoined and restrained from making any assignment or transfer of the certificate of sale herein mentioned.

That the said assessment for taxes, and all proceedings to collect same, be declared null and void, and be set aside.

The defendants The Mayor, Aldermen and Commonalty alone answered the complaint. The defendant Peterkin made default.

On the trial, the material facts set forth in the complaint, with others, were proven.

Upon the facts proven, the property of the plaintiff was exempt by law from the tax in question. It is provided that "every building for public worship" shall be exempt from taxation (1 *R. S.* [5th ed.], p. 906, sec. 5); but to be so exempt the building or premises shall be exclusively used for public worship (*Sec. 6*). The evidence shows that the premises in question were so exclusively used at the time of the imposition of the tax and the sale thereunder. But yet, as the facts which constitute the exemption of the premises in question from taxation do not appear upon the face of the record or in the proceedings, the imposition of the tax would seem regular.

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An action will lie where the tax is upon land which is liable to be sold to collect it, and when the conveyance, to be executed by the proper officer, would be conclusive evidence of the title, and the tax was not void on the face of the proceedings. Where the validity of the tax can only be impeached by extrinsic evidence, relief in equity is available (*Heywoods* agt. *The City of Buffalo*, 14 *N. Y.*, 534; *Crooke* agt. *Andrews*, 40 *id.*, 547; *Western R. R. Co.* agt. *Nolan*, 48 *id.*, 519). An action to cancel and annul a certificate of sale upon a void assessment is maintainable when the defect does not appear upon the face of the proceedings (*Mack* agt. *Wheeler*, 48 *N. Y.*, 486; *Hatch* agt. *City of Buffalo*, 38 *id.*, 276).

The certificate of sale is presumptively a lien upon the premises, and the lease, if executed by the comptroller, will be, presumptively, evidence of the regularity and validity of the assessment proceedings (*Laws of N. Y.*, 1871, vol. 2, page 743). This action is maintainable.

The remedy by *certiorari* is not adequate in the present case, nor would it seem to be proper.

That would seem to be an appropriate remedy to review erroneous assessments, not where property has been attempted to be sold in violation of law, under an assessment illegally imposed, and where the illegality does not appear in the proceedings (*National Bank of Chemung* agt. *City of Elmira*, 53 *N. Y.*, 49; see, also, the opinion of VAN BRUNT, J., in *The Hebrew Free School* agt. *The Mayor, Aldermen and Commonalty of the City of New York*, at special term, supreme court, November, 1874).

There should be judgment for plaintiff, as prayed for in the complaint.

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N. Y. SUPERIOR COURT.

BENJAMIN DIETZ agt. JOHN T. FARISH.

Action to compel specific performance — not a proper case — relief always discretionary.

A contract or agreement is the union of two or more minds in a thing done or to be done. The assent of the parties must be mutual, reciprocal, concurrent.

There must be some medium of communication by which the union of minds may be ascertained and manifested. This medium is language, symbolical, oral or written. In oral and symbolical communications, when the parties are together, the assent is mutual and the contract completed when the acceptance of one party is announced to the other.

In written communications, and especially in cases where the law requires the assent to be evidenced by a writing, the writing must be delivered by the party to be bound thereby in such a manner as to deprive him of the right to recall it. The intent is the governing and controlling element in the determination of the question whether a contract has or has not been concluded in a given case.

Although the mere consent of the parties is sufficient for the perfection of consensual contracts, nevertheless, if, in agreeing upon a sale or any other bargain, they also agree that there shall be some other formal act, with the intent that the bargain shall not be deemed perfect until such act is performed, the parties, though they may have agreed upon the terms, may recede before the act is complete.

In the case of a contract under seal or a deed, the *locus poenitentiae*, the opportunity of withdrawing from it before the parties are finally bound, exists up to the time of its actual delivery as a living obligation.

D. and F. being in treaty for the purchase and sale of a house, met at F.'s office for the purpose of continuing the negotiations. D. brought with him a printed form of contract in duplicate, with a description of the premises filled in. D. signed both of the contracts and handed them to F. for signature, who signed both. At this stage of the business it was decided by F. to proceed no further in it until he had advised with his counsel. At the time it was agreed between the parties to make the delivery of the contract and the payment of the first installment

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required by it dependent upon the approval of F.'s counsel. F. took both duplicates into his possession, and both parties proceeded to the office of F.'s counsel. The latter not being in, both duplicates, together with a check for the amount of the first installment, were left by F. for his counsel, with instructions, in case of approval, to deliver one of the duplicates and the check to D. The contract was never approved, nor were any of the papers handed by said counsel, or with his knowledge or consent, to the plaintiff. Before leaving the office of F.'s counsel, D. succeeded in obtaining one of the papers by removing it from a desk where it was lying, and, putting it in his pocket, took it away with him.

Held, that there was no valid delivery. The mere fact that the plaintiff, against the express understanding of the parties, managed to get hold of one of the duplicates, is not sufficient to enable him to maintain an action for specific performance. Under the facts as found, the case is not one for a specific performance.

Held, also, that although the subscribing witness was subsequently induced by plaintiff to acknowledge, before a commissioner, the execution and delivery of the instrument, it cannot avail the plaintiff where it appears from the evidence that he, at the time of making such acknowledgment, had no knowledge that the contract had not been concluded, or that the duplicates had not been duly exchanged, and was not aware that any controversy touching the matter had arisen, but had every reason to believe that a delivery had taken place.

Special Term, March, 1877.

ACTION for specific performance.

The material facts in this case are as follows: The plaintiff and the defendant being in treaty for the purchase and sale of the house in question, met at the defendant's office on the 26th of April, 1875, for the purpose of continuing the negotiations. The plaintiff brought to this place of meeting a printed form of contract, in duplicate, filled in with a description of the premises. There were present at this meeting, besides the parties, Mr. George W. Pell and Mr. Alexander T. Robertson. The blanks were filled. The plaintiff signed both of the contracts, and handed them to the defendant for signature. The defendant then signed both and handed them to Mr. Pell, the friend and adviser of Mr. Farish, the defendant, who was then and now is in infirm health and very deaf. At this stage of

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the business it was decided by Mr. Farish, the defendant, to proceed no further in it until he had advised with his counsel. To this the plaintiff assented. Accordingly both the contracts were retained by Mr. Farish, and the parties left the office, Mr. Pell separating from them at the door and going home, while Dietz, Farish and Robertson proceeded to the office of Shipman, Barlow, Larocque & MacFarland, to confer with Mr. Anderson of that firm.

In this immediate connection, Mr. Pell states that on the occasion in question, he went to the office of Mr. Farish, as his friend and adviser (Mr. Farish being very deaf and in ill-health), accompanied by young Mr. Robertson. The interview with Dietz, and the matter in hand, were, on the suggestion of Mr. Pell, intrusted by Mr. Farish entirely to his charge, and he informed Mr. Dietz to that effect. Mr. Pell thereupon offered \$58,000 for the house. Dietz finally decided to accept that. Thereupon he produced from his pocket two blank articles of agreement, with the description filled in.

Mr. Pell observed that he knew nothing about the description, and had only learned of the matter that morning. Mr. Pell then filled up the articles of agreement. He gave one to Dietz and kept the other, reading it aloud in order to compare the two. They were then signed by Dietz and by Farish, and handed to Mr. Pell to be witnessed by him. While they were lying upon the table, in his possession, it was proposed that something should be paid upon account; whereupon Mr. Pell suggested \$2,000. Mr. Farish, according to the recollection of Mr. Pell, was about to fill up a blank check, when he asked Mr. Dietz if he had the papers. Mr. Dietz replied "no," but that he should have them all that day. Thereupon Mr. Pell suggested that the whole matter should be referred to Mr. Farish's lawyer at once, to be settled with him, to which no objection was made. The papers were all handed by Mr. Pell to Mr. Farish, Mr. Pell saying at the time, "I have nothing more to do with the matter."

The duplicate contracts, signed at Mr. Farish's office, were

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afterwards handed to Mr. Collins, at Mr. Anderson's office, by Mr. Farish, to be given to Mr. Anderson, and if he approved of them and thought they were all right, and was satisfied they were all right, Mr. Dietz was to receive \$2,000 on Mr. Farish's account. To pay the \$2,000, Mr. Farish left a check with Mr. Collins to the order of Shipman, Barlow, Larocque & MacFarland. While in Mr. Anderson's office, at this time, Mr. Dietz asked Mr. Collins for the paper which belonged to him, to which Mr. Collins replied, that he did not know that any paper belonged to him; that he had heard what Mr. Farish had said, that they were to be submitted to Mr. Anderson, and if they were all right, he was to receive \$2,000. Before leaving the office, Mr. Dietz succeeded in obtaining the paper without either Mr. Farish's or Collins' consent, and, putting it in his pocket, took it away with him.

The plaintiff never came into possession of this contract through a delivery thereof by Mr. Farish, the defendant, or any one authorized by him to make such delivery.

Sigismund Kaufmann, attorney, and *Lewis Sanders*, of counsel for plaintiff.

Shipman, Barlow, Larocque & MacFarland, attorneys.

W. W. MacFarland, of counsel for defendant.

FREEDMAN, *J.*—This is an action to compel the specific performance of a contract for the sale and purchase of real estate.

The defense is two-fold: First, that the contract was never concluded so as to be binding upon the parties; and, secondly, if it was, that a defect existed in plaintiff's title.

Upon these issues evidence was introduced by both sides, and upon such evidence several interesting questions of fact and of law arise.

As to the facts, I shall only say that upon a proper application of the rules which govern in the consideration of testimony, the evidence preponderates so largely in favor of the

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defendant that he is entitled to have his version concerning the transactions constituting, as plaintiff claims, an execution and delivery of the contract, adopted as the true one. So far as necessary the facts thus established will be referred to hereafter.

As to the law, the learned counsel for the plaintiff strenuously insisted that in every aspect which may be taken of the case there was, in law, a perfect execution and delivery of it, and that such execution and delivery could not be varied by proof of annexation of conditions.

This claim, in view of the facts as actually determined, is a bold and startling one, and in consequence thereof I felt induced to make, and did make, before coming to a conclusion thereon, a careful examination of the principles of law which govern in the matter of the execution and delivery of contracts. The conclusions at which I arrived, after such examination, may be stated to be as follows:

A contract or agreement is the union of two or more minds in a thing done or to be done. In the language of some of the old writers, it is called "a coupling or knitting together of minds." The assent of the parties must be mutual, reciprocal, concurrent.

There must necessarily be some medium of communication by which the union of minds may be ascertained and manifested. Among men this medium is language, symbolical, oral or written.

In oral and symbolical communications, when the parties are together, the assent is mutual and the contract completed when the acceptance of one party is announced to the other.

In written communications, and especially in cases where the law requires the assent to be evidenced by a writing, the writing must be delivered by the party to be bound thereby in such a manner as to deprive him of the right to recall it.

The delivery may be by words without acts; as if a deed be lying upon a table, and the grantor says to the grantee, "take that as my deed," it will be a sufficient delivery; or it

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may be by acts without words, and therefore a dumb man may deliver a deed.

The intent is the governing and controlling element in the determination of the question whether a contract has or has not been concluded in a given case. Established forms and ceremonies furnish useful indications of intention; but in themselves, and in the absence of mutual and concurring intention, meeting in the same sense, to the same point, and embracing the same subject-matter, they are inoperative. This is a rule of universal jurisprudence, and applies to all classes of contracts.

Thus, although the mere consent of the parties is sufficient for the perfection of consensual contracts, nevertheless, if, in agreeing upon a sale or any other bargain, they *also agree* that there shall be a formal act passed before a notary, with the intent that the bargain shall not be deemed perfect until the notarial act is so likewise, the parties, though they may have agreed upon the terms, may recede before the act is complete (*Pothier on Obligations*, art. 1, *Ev.*, p. 110).

Referring to the same principle, under another title, Mr. Bell, in his very learned commentaries on Law of Scotland (7th ed. [*McLaren*], bk. 3, pt. 1, p. 345), says :

The plea of *locus pœnitentiæ* is grounded not merely on the want of evidence of a bargain, but on the want of that perfect and full consent which stands contradistinguished from imperfect resolution or intention. The want of evidence may be supplied by a reference to oath; the want of the badge of full and perfect consent never can be so supplied. Such evidence may supply the loss of the document after it has been *completed* as an irrevocable engagement; but it will not destroy the privilege of receding, where the irrevocable obligation has not been legally declared.

In the case of a contract under seal or a deed therefor, the *locus pœnitentiæ*, the opportunity of withdrawing from it before the parties are finally bound, exists up to the time of its actual delivery as a living obligation.

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If the grantor do not intend that his deed shall take effect until some condition is performed, or the happening of some future event, he should either keep it himself, or leave it with some third person as an escrow, to be delivered at the proper time.

If he deliver it as his deed to the *grantee*, it will operate immediately, and without any reference to the performance of the condition, although such a result may be contrary to the express stipulation of the parties at the time of the delivery. This is one of the cases in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object.

But it is only in cases falling strictly within the exception stated, that is to say, in cases of delivery of the deed with intent to part with it as a deed, and for the benefit of the grantee, that the law, for reasons of public policy, fails to carry out the intention of the parties as expressed in the condition annexed to the delivery, and rejects parol evidence as to such condition (*Worrall agt. Munn*, 5 *N. Y.*, 229; *Braman agt. Bingham*, 26 *id.*, 483; *Cocks agt. Barker*, 49 *id.*, 107).

If, though there be a delivery to the grantee, the deed is delivered with the intent that the grantee shall not take it as the deed of the grantor, nor receive it as grantee, but as the agent of the grantor for a special purpose, as, for instance, for the purpose of transmitting it to a third person to be held by the latter in escrow, the case does not come within the exception (*Gilbert agt. The North Am. Fire Ins. Co.*, 23 *Wend.*, 43).

A deed may be deposited with the grantee, or handed to him, for any purpose other than as the deed of the grantor or as an effective instrument between the parties, without becoming at all operative as a deed (*Ford agt. James*, 2 *Abb. Ct. of App.*, 159; *per GROVER, J.*, 163).

Formerly the law was that delivery in escrow must be to a stranger, and that if made to the grantee's authorized agent the delivery has the same effect as if made to the grantee

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personally. But this rule has since been invaded by numerous acknowledged exceptions.

Thus, in *Watkins* agt. *Nash* (*L. R.*, 20 *Eq. Cas.*, 262; *S. C.*, 13 *Moak's Eng. R.*, 781), vice-chancellor HALL had occasion to pass on the question of delivery in escrow to the solicitor of a party to the deed, and sustained the apparent intent of the parties against a strict construction of the technical rule, that delivery to the agent of the grantee cannot be in escrow. It appeared that defendant's solicitor, Skyrme, represented to plaintiffs that his client wished to pay off a mortgage which the plaintiffs, as trustees, held on Nash's estate; and at Skyrme's request, to facilitate the transaction, as he said, they executed a reconveyance and delivered it to him expressly as an escrow, and took a writing declaring it to be such. Skyrme used the reconveyance to get the money from his client, which he appropriated, and then returned the reconveyance, pretending that the payment was not made.

The vice-chancellor laid down the broad explanation of the old rule, that when a stranger was spoken of, "what is meant, is a delivery of a character negating its being a delivery to the grantee or to the party who is to have the benefit of the instrument. Moreover, the delivery to the solicitor of the grantee might be deemed a delivery to a third person for the benefit of all parties."

On the other hand, if the usual formalities of execution take place, and the contract under seal is, to all appearances, consummated without any conditions or qualifications annexed, and the acts of the parties clearly evince their intention to be bound without a formal delivery, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor (*Scrugham* agt. *Wood*, 15 *Wend.*, 545, and cases there cited). Here, again, the law regards the duly authenticated intention of the parties rather than mere ceremonial formalities. It even regards the mere possession of the document as a non-essential, but the decisive and conclusive evidence of the intention of the parties as the operative and controlling feature.

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I think I have now sufficiently demonstrated, for the purposes of the case before me, that, except where reasons of public policy intervene, it is the invariable policy of the law, in determining the question of the execution and delivery of a contract, to give full effect to the true intent and meaning of the parties, so far as the same can be ascertained from the surrounding circumstances, and that in this respect the law is in full accord with right, reason and substantial justice.

The claim advanced by the learned counsel for the plaintiff that, notwithstanding the agreement of the parties that delivery should take place upon the approval of the contract by counsel, the bare execution of it under seal, so far as it was executed, imparted binding force to it, and is not only sufficient, but conclusive evidence of the existence of a valid contract, involves, therefore, a misconception of the true relations of legal principles.

At the time it was agreed between the parties to make the delivery of the contract and the payment of the first installment required by it dependent upon the approval of defendant's counsel, it had not yet been delivered either by words without acts, or by acts without words. It was still under the control of the defendant, and his opportunity for withdrawing had not yet expired. Not even a qualified or conditional delivery had been made to the plaintiff. The defendant thereupon took both duplicates into his possession, and both parties proceeded to the office of defendant's counsel. The latter not being in, both duplicates, together with a check for the amount of the first installment required to be made by the contract, were left by defendant for his counsel with instructions, in case of approval, to deliver one of the duplicates and the check to the plaintiff. The contract was never approved, nor were any of the papers handed by said counsel, or with his knowledge or consent, to the plaintiff. Hence there was no valid delivery. The mere fact that plaintiff, against the express understanding of the parties, managed to get hold of one of the duplicates, is not sufficient to enable him to maintain the action.

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Nor can it avail the plaintiff that he succeeded in subsequently inducing Mr. Pell, the subscribing witness, to acknowledge, before a commissioner, the execution and delivery of the instrument, when, as appears from the evidence, the said witness, at the time of making such acknowledgment, had no knowledge that the contract had not been concluded, or that the duplicates had not been duly exchanged, and was not aware that any controversy touching the matter had arisen, but had every reason to believe that a delivery had taken place. True, he should not have made the acknowledgment, unless he knew the fact to be as he stated, and his course, in that respect, is highly reprehensible. But I do not see why the consequences of his unauthorized act should be visited upon the defendant. Even the record of a deed, after acknowledgment, is only *prima facie* evidence of a delivery, and as such it may be rebutted (*Jackson agt. Perkins*, 2 *Wend.*, 308; *Gilbert agt. North Am. Fire Ins. Co.*, 23 *id.*, 43).

In my findings I have set forth with great particularity all the circumstances touching the execution of the contract, its deposit in the office of defendant's counsel, and the manner in which plaintiff got possession of the duplicate upon which he brought this action. It is, therefore, not necessary to enlarge upon them here. Suffice it to say that upon the facts as thus established, plaintiff has failed to show that the said contract for the purchase and sale of the premises in question, was ever concluded so as to have any binding force whatever.

In regard to the alleged defect in plaintiff's title, I have come to the conclusion that upon the evidence as it stands, the plaintiff did not have a marketable title to the premises described in the complaint.

The facts being as found, the case is not one for a specific performance. This relief is always discretionary and will never be granted except it be strictly equitable under all the circumstances that it should be granted.

The defendant is entitled to judgment, dismissing the complaint upon the merits, with costs.

Attorney-General agt. Atlantic Mutual Life Insurance Co.

IN THE MATTER OF THE APPLICATION OF THE ATTORNEY-
GENERAL agt. THE ATLANTIC MUTUAL LIFE INSURANCE
COMPANY.

*Life insurance company — application for appointment of receiver — section 7,
chapter 902, Laws of 1869.*

The provisions of section 7 of chapter 902 of the Laws of 1869 make it the duty of the superintendent of the insurance department, whenever the affairs of any life insurance company which has deposited securities under this act, or the act hereby amended, shall, *in his opinion*, appear in such a condition as to render the issuing of additional policies and annuity bonds of said company injurious to the public interests, to report that fact to the attorney-general, *whose duty it shall then be* to apply to the supreme court for an order requiring the company to show cause why a receiver should not be appointed, and its business closed up.

When the superintendent reports to the attorney-general as the statute prescribes, the latter *must* submit the facts to the court, and that tribunal *must* proceed as the law directs.

The supreme court has no power to review the preliminary action of the superintendent in making his report. If any error has been committed or mistake made by the superintendent, the hearing, and that alone, will remedy it.

But it must be proved, to the satisfaction of the court, upon the investigation, that there is danger to the public interests by the continuance of the business of the company, before it would be warranted in making the final order, arresting future operations and appointing a receiver.

Albany Special Term, May 14, 1877.

APPLICATION by the attorney-general, pursuant to section 7 of chapter 902 of Laws of 1869, for a receiver of the company.

Charles S. Fairchild, attorney-general, for motion.

William Barnes and *Henry Smith*, opposed.

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WESTBROOK, J. — By section 7 of chapter 902 of the Laws of 1869, it is provided: "If at any time the affairs of any life insurance company, which has deposited securities under this act, or the act hereby amended, shall, in the opinion of the superintendent of the insurance department, appear in such a condition as to render the issuing of additional policies and annuity bonds of said company injurious to the public interests, the said superintendent shall report that fact to the attorney-general, whose duty it shall then be to apply to the supreme court for an order requiring the company to show cause why its business should not be closed. The court shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it shall appear, to the satisfaction of the said court, that the assets and funds of said company are not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations, as authorized by its charter, then the said court shall issue an order enjoining and restraining said company from the further prosecution of its business, and shall also appoint a receiver of the assets of said company," etc.

The petition or statement of the attorney-general to the court, showing that the superintendent of the insurance department had made such a report to him, as is required by the section of the statute just quoted, an order to show cause, also in conformity therewith, was granted on the eleventh day of May, instant, returnable this day. It is now objected, in behalf of the company, that the moving papers do not show upon what evidence the superintendent acted in making his report to the attorney-general, and that, therefore, as the court cannot see the legal sufficiency of the evidence upon which the superintendent acted to justify such action, no further proceedings can be had upon the present application. A careful reading of the section fails to show any power in the court to review the preliminary action of the superintendent in making his report. The court can, and must, undoubtedly,

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by evidence to be given upon the hearing, be satisfied "that the assets and funds of the company are not sufficient to justify the further continuance of the business" before it would be warranted in making the final order arresting further operations and appointing a receiver; but such inquiry is compulsory upon the court when the attorney-general presents a case within the terms of the statute, and that officer (the attorney-general) must bring the matter to the attention of the court whenever the superintendent reports to him as the same section prescribes. Upon what evidence the superintendent shall act the law is silent. In his "opinion," the affairs of the company must "appear" to be "in such a condition as to render the issuing of additional policy and annuity bonds by said company injurious to the public interests," before he would be justified to "report that fact to the attorney-general;" but in what way his "opinion" shall be formed, and by what evidence it must so "appear" to him, the statute affords no light. The superintendent is an officer of the state, and acts upon the responsibility of his official oath. It is not to be presumed that he would act lightly or hastily. It is true that the power intrusted to him, as all power in the hands of any official may be, can be abused, but the guard in the act is not to review the preliminary action which he takes to compel investigation by the court, but the need of proving, to the satisfaction of the court, upon such investigation the danger to the public interests by the continuance of its business. It is also true that hasty action by the state official may, for a time, impair the credit of a solvent corporation by an unjust accusation, but the court has no power, without a hearing, to declare that the preliminary report was unjustified. In short, when the superintendent reports to the attorney general as the statute prescribes, the latter must submit the facts to the court, and that tribunal must proceed as the law directs. If any error has been committed or mistake made by the superintendent, the hearing, and that alone, will remedy it.

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The company, by the affidavit of its secretary, having declared its solvency and ability to continue business, an examination in conformity with the requirement of the act must be had. As the enjoining of further business, and the appointment of a receiver, can only be justified by satisfying the court "that the assets and funds of said company are not sufficient to justify the further continuance of the business," it is apparent that a critical examination of all its "assets and funds" must be made, as well of all its obligations and liabilities. What standard, the court ought to adopt in determining the propriety of further continuance of the corporation will not now be prescribed, further than to say that whatever evidence throws light upon its "funds and assets" and liabilities will be received and considered. Neither can it be decided now what principle shall be adopted, whether gross or not, in valuing the policies. It can, however, without impropriety, be stated that it would be well to have a detailed examination of each policy made, and the actual value thereof, if any, to the company stated, based upon the future payments to be made thereon, deducting therefrom one-sixth for future expenses and contingencies, so that the court can have before it the result thereof upon the final submission of the controversy.

Real Estate Trust Company agt. Rader *et al.*

SUPREME COURT.

REAL ESTATE TRUST COMPANY agt. LOUIS B. RADER *et al.**Mortgage—Usury—Estoppel.*

Where a mortgage of \$20,000 was made to a third party to be sold, the plaintiffs purchasing said mortgage from an agent of the mortgagor and mortgagee, and paying for the same \$18,000, and afterwards receiving \$1,000 payment on the same; at the time of the assignment of the mortgage to plaintiffs, the mortgagor executed and delivered the usual mortgagor's certificate, upon the faith of which the plaintiffs took the assignment:

Held, that, the plaintiffs having relied on the assurances of defendant, contained in the certificate, in taking the mortgage the defendant is estopped from setting up usury as a defense.

Held, also, that although said bond and mortgage, as to the original mortgagee, had no legal inception, yet in the hands of the plaintiffs it is a valid and subsisting lien, to the extent of the consideration advanced upon it.

The plaintiffs having acquired a valid title to the mortgage, no subsequent usurious agreement to extend the time of payment could impair or avoid the original obligation.

Special Term, April, 1876.

THIS action was brought to foreclose a mortgage, and the defendants set up usury as a defense.

The following are the facts as found by the court:

First. That the plaintiffs, the Real Estate Trust Company, are a corporation created under and by virtue of an act of the legislature of the state of New York, entitled "An act to incorporate the Real Estate Trust Company," passed April 19, 1871, and the various acts amendatory thereof.

Real Estate Trust Company agt. Rader *et al.*

Second. That the defendant, Louis B. Rader, for the purpose of raising money for his own benefit, did, on or about the 6th day of May, 1872, execute and deliver to one Andrus B. Howe a bond sealed with his seal, whereby he bound himself, his heirs, executors and administrators in the penalty of \$40,000, upon the condition that the same should be void if the said defendant, Louis B. Rader, should pay to the said Andrus B. Howe, his executors, administrators or assigns, the just and full sum of \$20,000, on the sixth day of May, which would be in the year 1874, and the interest thereon to be computed from the day of the date thereof, at and after the rate of seven per cent per annum, and to be paid half yearly, on the sixth days of November and May of each and every year, until said principal sum should be fully paid.

Third. That, as collateral security for the payment of the said bond, the defendant Louis B. Rader, and the defendant Esther Amelia Rader, his wife, did on the same day execute, and, on the 4th day of June, 1872, duly acknowledge and deliver to the said Andrus B. Howe, a mortgage, whereby they granted, bargained and sold to the said Andrus B. Howe the premises described in the complaint in this action, with a proviso, in substance, the same as the condition of the said bond.

Fourth. That the said mortgage was duly recorded in the office of the register of the city and county of New York, on the 5th day of June, 1872, in liber 1075 of mortgages, page 6.

Fifth. That, prior to the execution of the said bond and mortgage, the defendant Louis B. Rader had employed one Thomas W. Allen, a real estate broker, for the purpose of raising money upon the premises designated in the said mortgage; that, at the suggestion of the said Allen, the said bond and mortgage was made and executed with a view that the same should be sold and the proceeds received by the said defendant Rader.

Sixth. That no consideration passed from Andrus B. Howe to the said Rader upon the delivery of the said bond and

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mortgage to the said Howe, which delivery was made on or about the 4th day of June, 1872, at which time the bond and mortgage were placed in the possession of the said Allen, as the agent for said Howe and for said Rader.

Seventh. That, on or about the 23d May, 1872, the said Allen, as the agent for the said Howe and Rader, made an application to the plaintiffs to sell to plaintiffs, on the part of said Howe, the said bond and mortgage, and that, after some negotiation between the plaintiffs and the said Allen, in the early part of June, 1872, the plaintiffs agreed to purchase the said bond and mortgage from the said Howe, for the sum of \$18,000.

Eighth. That the plaintiffs, until after the consummation of their purchase of the said bond and mortgage, were ignorant of the circumstances of the inception of the said bond and mortgage, and had no information with respect thereto, and did not know, and had no reason to suspect, that the said Allen was the agent of the defendant Rader, or was the agent for any person other than the said Andrus B. Howe.

Ninth. That, on or about the 20th day of June, 1872, by instrument of assignment of that date, delivered June 22, 1872, under the hand and seal of the said Andrus B. Howe, duly executed and acknowledged, the said Andrus B. Howe, for a valuable consideration in hand paid, did grant, bargain, sell, assign, transfer and set over unto the said plaintiff the said indenture of mortgage, together with the said bond or obligation, and the moneys due and to grow due thereon; and that the said Andrus B. Howe, in and by the said assignment, did covenant with the said plaintiffs that all of the said sum of \$20,000 secured by said bond and mortgage, together with interest thereon from the date thereof, was unpaid thereon, and that there was no offset or defense whatsoever against the same.

Tenth. That the said instrument of assignment was duly recorded in the said register's office on the 22d day of June, 1872, in liber 1067 of mortgages, page 552.

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Eleventh. That, on or about the 20th day of June, 1872, by a certain instrument or declaration of that date under the hand and seal of the said Louis B. Rader, duly executed and acknowledged, the said Louis B. Rader did certify, acknowledge and declare that the said bond and mortgage were a good and valid bond and mortgage, and that the same had not been paid, nor any part thereof, nor was there any defense or offset whatsoever against the same, but that the whole of the sum of \$20,000, secured thereby, with interest thereon, from date thereof, was unpaid thereon, and that the same were a good, valid and subsisting lien upon the lands and premises, described in said mortgage, and that due notice of the assignment of the said bond and mortgage to the said plaintiffs had been given to him.

Twelfth. That, during the said negotiations for the purchase by plaintiffs of the said bond and mortgage, the said Thomas W. Allen, as the agent of the said Louis B. Rader, and as the apparent agent of said Andrus B. Howe, represented to the plaintiffs that the said bond and mortgage was a good and valid one, and that no defense existed thereto, or to the collection of the moneys secured thereby; that in making the purchase of the said bond and mortgage, and in taking an assignment of the same, the said plaintiff relied upon the truth of the said representations made to them by the said Allen, and also relied upon the truth of the statements made to them by the said Howe in the aforesaid instrument of assignment, and also relied upon the truth of the statements made to them by the said Louis B. Rader in the aforesaid instrument or declaration, dated June 20, 1872, and that plaintiffs believed all said representations and statements to be true, and relied and acted upon the faith of them in purchasing the said bond and mortgage, and in permitting the same to be assigned and transferred to them; that the said plaintiffs, in taking the said assignment of the said bond and mortgage as aforesaid, on or about the 22d day of June, 1872, actually paid out and advanced, in reliance upon the

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truth of the aforesaid representations and statements, the sum of eighteen thousand dollars.

Thirteenth. That the defendants have failed to comply with the conditions of the said bond and mortgage by omitting to pay the sum of \$18,000, the principal justly due thereon, to the plaintiffs, which became due on the 6th day of May, 1874.

Fourteenth. That, on the 19th May, 1874, the said defendant Louis B. Rader paid to the plaintiffs the sum of five hundred dollars. On the 28th May, 1874, said Louis B. Rader paid to the plaintiffs the sum of five hundred dollars, which sums plaintiffs have credited, and which should be allowed in diminution of the principal due and payable on the said bond and mortgage.

Fifteenth. That there is now due to the said plaintiffs upon the said bond and mortgage the sum of seventeen thousand dollars of principal and interest on that sum from the 6th November, 1874, to the date of these findings, viz.: The sum of \$1,745.33, which last-mentioned sum should be diminished, however, by the interest on five hundred dollars from May 19, 1874, to the said 6th day of November, 1874, to wit, the sum of sixteen dollars and twenty-three cents, and by the interest on five hundred dollars from May 28, 1874, to the 6th day of November, 1874, to wit, the sum of fifteen dollars and thirty-six cents, so that the amount due this day to said plaintiffs for interest moneys is the sum of \$1,713.74, and the sum due to plaintiffs at the date of these findings, for principal and interest together, is the sum of \$18,713.74 upon the said bond and mortgage.

Sixteenth. That no proceedings have been had at law or otherwise for the recovery of the said sums secured by the said bond and mortgage, or any part thereof.

Seventeenth. That the defendants have, or claim to have, some interest in or lien upon the said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued

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subsequently to the lien of the said mortgage, or is subject thereto.

Davies, Work, McName & Hilton, for plaintiff.

Morris Billings & Cardozo, for defendant Rader.

LARREMORE, J. — The defendant, in 1872, employed Allen, a real estate broker, to negotiate a loan upon certain real estate in the city of New York. At the suggestion of Allen, defendant and his wife, on May 6, 1872, executed a bond and mortgage upon said premises to Andrus B. Howe for \$20,000, payable in two years, with interest. The mortgage was acknowledged on the 4th and recorded on the 6th of June, 1872, but no consideration passed from Howe to defendant upon its delivery. Howe, through Allen, made application to the plaintiff for the purchase and sale of these securities, which was consummated June 22, 1872, by an assignment thereof to the plaintiff for \$18,000, which amount was paid. At the same time the usual mortgagor's certificate was executed and delivered to the plaintiff, whose officers testified to their belief in the truth of the statements contained in said certificate, and upon the faith of which they took the assignment.

I think the whole testimony justifies such a conclusion, and although said bond and mortgage as to Howe had no legal inception, yet in the hands of the plaintiff they are valid and subsisting liens to the extent of the consideration advanced upon them (*Payne* agt. *Burnham*, 62 N. Y., 69).

An attempt was made at the trial to charge plaintiffs with knowledge of the original transaction between Howe and defendant, but the weight of evidence is in favor of the fact that Allen was not the agent of the plaintiffs, but of Howe and the defendant.

The plaintiffs having thus acquired a valid title to the securities in question, no subsequent usurious agreement to

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extend the time of payment could impair or avoid the original obligation (*Agand* agt. *Ball*, 1 *Alb. L. J.*, 181; *Lesley* agt. *Johnson*, 41 *Barb.*, 359; *Hawks* agt. *Weaver*, 46 *id.*, 164).

Upon this theory evidence to establish such an agreement by the payment of \$1,000 was excluded under plaintiff's objection, and said amount having been credited on the account of the principal of the bond and mortgage, a rebate of interest thereon must be allowed from the time of such payment.

The defense of usury is overruled and judgment ordered in favor of plaintiff for \$17,000 and interest, and for a foreclosure and sale of the premises described in the complaint

Harding agt. Harding.

N. Y. SUPERIOR COURT.

THOMAS H. HARDING agt. JANE ELIZABETH HARDING.

Divorce for adultery — referee's report — power of special term to order new trial — Practice.

In an action for divorce on the ground of adultery, where the referee reported in favor of plaintiff, the defendant duly filing her exceptions to such report, the plaintiff moved, upon the referee's report and the testimony, to confirm such report. The defendant moved, at the same time, upon the exceptions, report and testimony, to vacate such report, and for further relief. The court made an order dismissing the complaint upon the merits:

Held, that the court erred in absolutely dismissing the plaintiff's complaint upon the merits. The order of the special term should have been, that the report be set aside, the order of reference vacated, and a new trial of the issues had, with costs to the defendant, to abide the event.

In this class of cases, the court at special term does possess the power to order a new trial. This power should be exercised, as near as possible, in conformity with the principles which control on a motion for a new trial on a case or exceptions.

If the exceptions are sustained, and the question is capable of being obviated by proof, no absolute judgment should be directed, but a new trial ordered.

General Term, May, 1877.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

THE action is brought to dissolve marriage on the ground of adultery of the defendant with one William Zandt.

The answer denies the adultery, and alleges condonation.

Upon consent, an order of reference was made to hear and determine all the issues.

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The referee reported in favor of the plaintiff upon all the issues.

The defendant duly filed her exceptions to the referee's report.

The plaintiff moved, upon the referee's report and the testimony, to confirm such report.

The defendant moved, at the same time, upon the exceptions, report and testimony, to vacate such report and for further relief.

Defendant's motion was granted and the plaintiff's motion denied.

Upon the settlement of the order defendant's attorney made default, and plaintiff's attorney entered an order recommitting the report and testimony to the referee.

Upon motion this default was opened, and after full argument an order was made dismissing the complaint upon the merits.

A decree was entered accordingly. Plaintiff appealed from the order of dismissal and the judgment entered therein.

James M. Smith, for appellant.

George Gallagher, for respondent.

FREEDMAN, J.—In *Sullivan agt. Sullivan* (52 *How.*, 453; 41 *N. Y. Superior Ct. R.* [9. *J. & Sp.*]) and *Blott agt. Rider* (47 *How Pr. R.*, 90), the policy of the statute relating to the granting of divorces, the reason for the enactment of the ninety-second rule, and the practice on references of the issues, have been fully discussed.

The order of reference in the case at bar was in all respects regular.

But the court at special term, in the exercise of its supervisory power, saw fit to withhold judgment of divorce, notwithstanding the issues had been determined by the referee in favor of the plaintiff. The only question, therefore, which

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is open for review is, whether the power was properly exercised upon the facts before the court.

Upon examination of the testimony I am satisfied that upon the ground of insufficiency of proof of the alleged adultery, as well as for the reason that, even in case of adultery, there was evidence showing condonation, the court below was fully justified in denying plaintiff's motion for confirmation of the report and in sustaining defendant's exceptions; but in absolutely dismissing plaintiff's complaint upon the merits, the court went too far.

The defendant had excepted to the report, and brought the exceptions to a hearing. Her motion was substantially a motion for a new trial, and though she was not bound to make it in a case prepared and settled as if the trial had been had by jury, she was, on the other hand, not entitled to relief exceeding that which is usually awarded to a party successfully moving for a new trial on a case or exceptions, under section 265 of the Code. In the last-mentioned case, no absolute judgment is given when the question is one that can be obviated by proof; but the order simply sustains the exceptions, if any there be, and the ruling made, or verdict rendered at the trial, is set aside and a new trial ordered, with costs to the moving party to abide the event.

Formerly, in an action for divorce on the ground of adultery, the court of chancery directed a feigned issue to be made up for the trial of the facts contested by the pleadings, and the court was expressly empowered by statute (2 *R. S.*, 145, *sec.* 40) to award a new or further trial of such issue as often as justice should seem to require. Under our present system of procedure, and the rules of the courts specially applicable to actions for divorce, the trial of the issue of adultery by a referee may be looked upon as one of the modes of trial which have been substituted for the trial by feigned issue, and hence, in this class of cases, the court at special term does possess the power to order a new trial.

The power, as already stated, should be exercised, as near

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as possible, in conformity with the principles which control on a motion for a new trial on a case or exceptions. Consequently, if the exceptions are sustained, and the question is capable of being obviated by proof, no absolute judgment should be directed, but a new trial ordered; and if it is a case for a new trial, the report should not be sent back to the referee with directions to take further proof, as may be done in a case of no answer, but the report should be set aside, the order of reference vacated, and a new trial of the issues ordered. In such case, the contesting parties are again free to select any one of the three modes of trial prescribed by the Code.

That part of the order of January 27, 1877, which denies plaintiff's motion for confirmation of the report, should be affirmed, but the remaining part should be modified so as to provide that the report be set aside, the order of reference vacated, and a new trial of the issues had, with costs to the defendant, to abide the event.

The judgment of March 5, 1877, should be reversed altogether.

SEDGWICK and SPEER, JJ., concur.

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National Bank of Utica agt. Wells.

SUPREME COURT.

SECOND NATIONAL BANK OF UTICA agt. WILLIAM WELLS,
impleaded.

Complaint by corporation — answer — demurrer.

In an action by an incorporated bank, where the complaint contains no allegation that the plaintiff is a corporation, or entitled to sue as such, the objection is properly taken by answer.

A demurrer can only be interposed where it affirmatively appears upon the face of the complaint that the plaintiff has *not* legal capacity to sue.

At Chambers, June, 1877.

MOTION for judgment upon answer alleged to be frivolous. The action was upon a promissory note owned by the plaintiff. The complaint did not allege that the plaintiff was an incorporation. The answer was substantially as follows: "First. That said plaintiff ought not to have or maintain this action against this defendant for the reason that said complaint does not show that said plaintiff is an individual or a corporation, or that said plaintiff has any legal capacity to sue, and this objection is taken by answer and not by demurrer for the reason that said complaint does not show on its face affirmatively that said plaintiff has legal capacity to sue. Second. Said defendant, impleaded as aforesaid, denies that said plaintiff is an individual or a corporation created by or under statute of this state."

E. Fink, for plaintiff.

R. Carroll, for defendant.

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HARDIN, J. — The complaint does not allege that the plaintiff is a corporation having legal capacity to sue. It does not allege that it is incorporated under the laws of this state. Therefore, section 3 (2 *R. S. [Edm. ed.]*, 477) does not apply. The objection can not be taken by demurrer, because the court of appeals have so held in *The Phoenix Bank agt. Donnell* (40 *N. Y.*, 410). The complaint can only prove what it alleges, no allegations being inserted that it has legal capacity to sue. Therefore, no proof of that fact could be given. The objection by answer is proper, and therefore the answer cannot be held to be frivolous. The motion must be denied, with ten dollars costs to defendant.

Rowell agt. Giles.

N. Y. SUPERIOR COURT.

GEORGE P. ROWELL and CHARLES N. KENT agt. WILLIAM
M. GILES and EDWARD C. JENKINS.

Reference — Complaint — Account stated and settled.

Where the complaint is so framed that the plaintiff must recover, if at all, upon an account stated, although a number of items entered into such account, an order of reference is unauthorized.

The only proof necessary or proper in such a case must relate simply to and must establish the liquidation and settlement of the amount of defendants' liability at the date when such statement and settlement are claimed to have been made.

The case does not require the "examination" of the account containing the items which entered into such account, thus alleged to have been stated and settled, but only the determination of the issue as to whether such account was or was not stated and settled in the manner and to the extent alleged in the complaint.

Special Term, June, 1877.

MOTION for an order of reference.

Evarts, Southmayd & Choate, for plaintiffs.

George Owen, for defendants.

SANFORD, J. — The complaint seems to have been framed upon the theory that, under the contract between the parties, the defendants had become absolutely liable for a specified amount, payable, by installments, at specified periods, before the modification of such contract by adding to such amount

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a separate sum due from defendants to plaintiffs, and the delivery to plaintiffs of defendants' promissory notes for a large part of such aggregate amount, was effected. The allegation is, in substance, that, on the 9th day of September, 1875, an accounting and settlement was had between the parties, in respect to the amount payable under the contract, which was thereupon ascertained, fixed and agreed upon as \$13,840.56; that defendants being also then and there indebted to plaintiffs in the further sum of \$4,537.24 upon another account, it was agreed, by and between the parties, that the aggregate of defendants' liabilities, viz., \$18,377.80, should be paid as follows: by notes (since paid), \$10,180.78, and the residue, viz., \$8,197.02, in seven monthly installments of \$1,171 each, commencing on the 8th day of December, 1876; that thereby, and by means of the promises, the said account became stated and settled, and defendants became and were, and still are, duly indebted to plaintiffs in the respective amounts so agreed upon, except as the same have been discharged by payment as stated.

There is no averment in the complaint that, under the original contract, the plaintiffs promised or agreed that the defendants' advertisement should be actually published in the newspapers specified, nor is it alleged that such publication has been made. The action is not brought, therefore, to recover for work, &c., done and performed, or procured to be done and performed, at an agreed price; and proof of such performance would, under the pleadings, be neither requisite or competent. No such cause of action is alleged. The plaintiffs must recover, if at all, upon an account stated, and the only proof necessary or proper in support of it must relate simply to and must establish the liquidation and settlement of the amount of defendants' liability at the date when such statement and settlement are claimed to have been made. With respect to the items which entered into such account, thus alleged to have been stated and settled, there is no controversy before the court. The case does not require the

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“examination” of the account containing them, but only the determination of the issue as to whether such account was or was not stated and settled in the manner, and to the extent alleged in the complaint.

I am of opinion that the case is substantially the same as it would have been had promissory notes been given for the several installments; and had the suit been instituted upon such promissory notes, in such case a reference would have been unauthorized. If the account was, in fact, stated and settled, as alleged, there is no more occasion to examine it than there would be if notes had been given for the amount found to be due.

The motion is denied, with ten dollars costs.

Matter of Barnett.

SUPREME COURT.

MATTER OF BARNETT.

Costs in proceedings on habeas corpus.

A writ of *habeas corpus* is a special proceeding under the act of 1854 (*Laws 1854, p. 598, sec. 8*) where it is made returnable in court, and where it calls into exercise the ordinary machinery of courts of law, such as the appointment of a referee to take the testimony, the examination of witnesses *pro* and *con*, and the subsequent hearing in due form in court on the whole evidence, and the decision of the court thereupon.

Costs are allowable in such proceedings, in the discretion of the court.

The costs allowed embrace, however, only the items for proceedings after petition and before trial, and for trial and disbursements (*Affirming S. C., 52 How., 73*).

First Department, General Term, January, 1877.

Before NOAH DAVIS, P. J., JOHN R. BRADY and CHARLES DANIELS, JJ.

APPEAL from an order allowing costs to the relator (*See 52 How., 73*).

F. J. Fithian, for appellant.

Charles Blandy, for petitioner.

BRADY, J. — The question presented by this appeal is, whether the petitioner is entitled to costs because, as insisted, this is a special proceeding, and therefore within the provi-

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sions of the act of the legislature passed in 1854 (*Laws* 1854, p. 593, sec. 3), which declared that costs may be allowed in the discretion of the court in special proceedings, and when so allowed shall be at the rate allowed for similar proceedings in civil actions. The learned justice who disposed of this matter thought costs should be awarded the petitioners, and allowed them. The respondent below appeals.

There is no adjudicated case in which costs have been allowed in proceedings on *habeas corpus*. The writ is one of right, and it has not been heretofore trammelled by any consequences other than the failure to obtain the object in view when it was applied for, which sometimes occurs. It is, nevertheless, a special proceeding when it is made returnable in court, and where, as in this case, it called into exercise the ordinary machinery of courts of law, such as the appointment of a referee to take the testimony, the examination of witnesses *pro* and *con*, and the subsequent hearing in due form in court on the whole evidence, and the decision of the court thereupon. The court of appeals have held that a *certiorari* to review summary proceedings between landlord and tenant was a special proceeding under the act of 1854 (*supra*), and that to the successful party costs might be awarded (*The People* agt. *Boardman*, 4 *Keyes*, 59).

In kindred matters the same doctrine has been promulgated (*In the Matter of*, &c., *Rensselaer and Saratoga R. R. Co.* agt. *Davis*, 55 *N. Y.*, 145; *In the Matter of Dodd*, 27 *id.*, 629; *People ex rel. Van Rensselaer* agt. *Van Alstyne*, 3 *Keyes*, 35, and cases cited; *People ex rel. Latorre* agt. *O'Brien*, 3 *Abb. Ct. of App. Cases*, 559; *In the Matter of the Bowery Extension*, 12 *How. Pr.*, 99).

In the Matter of Dodd it was suggested that in order to make proceedings special under the act in question there must be a litigation in court. In this case there were proceedings by contest, as already stated, although the writ of *habeas corpus* is a writ of right, and sacred to the cause and principles of liberty. It may, nevertheless, be abused, or the

Matter of Barnett.

remedy which it is issued to accomplish unjustly refused by the respondent. The writ, in other words, may be sued out vexatiously, or the refusal to surrender the person detained may be equally vexatious.

Whether either of these features exist, it is for the court to judge, and hence the discretion which must be called into play before costs can be awarded.

If there be reasonable ground to warrant an application for the writ, no costs should follow. If there be reasonable ground for refusing to surrender the person, a like result would ensue. This was doubtless all considered by the legislature when the subject of special proceedings was considered and passed upon, and in view of their character, including the *habeas corpus*, the conclusion adopted to vest in the court conducting them a discretion to allow or disallow costs.

In this case the costs would seem to have been justly awarded, and the order granting them should be sustained.

The costs allowed embrace, however, only the items for proceedings after petition and before trial, and for trial and disbursements (55 *N. Y., supra*, 147).

The order appealed from must be modified in this respect, therefore, and as modified affirmed without costs.

Odell agt. Mylins.

SUPREME COURT.

THOMAS B. ODELL, Receiver of BERNHARD A. MYLINS, agt.
CORNELIA K. MYLINS and BERNHARD A. MYLINS.

Husband and wife — ante-nuptial agreement as to her separate estate — creditors of husband.

Where, after marriage, the husband paid the interest on a mortgage on the separate property of his wife, and for its benefit, in pursuance of an agreement between them before marriage, that if he occupied a portion of her premises after marriage, as an office for his business as a physician, he would pay interest on the mortgage in lieu of rent.

Held, that the agreement was valid, and that the payment was not in fraud of the creditors of the husband.

Special Term, April, 1877.

Frederick S. Wait and E. Ellery Anderson, for plaintiff.

John A. Dunkel, for defendants.

VAN VORST, J. — The defendants are husband and wife. Before their marriage, it was agreed that if the future husband, who was a physician, should keep his office and see his patients in the house owned by the woman he was about to marry, he would pay the interest on the mortgages existing on the premises. The parties afterwards intermarried; they together occupied the premises as a dwelling, and the husband used a portion of the same, the front basement, for the purposes of his profession.

Two sums of \$490 dollars each, being one year's interest, paid by the husband in 1875 and 1876, on a mortgage of

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\$14,000, a lien on the premises before marriage, give rise to this action.

The plaintiff is a judgment creditor of the husband, with execution returned unsatisfied, and claims that this interest was paid by the debtor in fraud of his creditors, and for the benefit of the separate estate of his wife, and that the property is liable to the husband's creditors, to the extent of such payment.

The payments made by the husband on the mortgage were considered by him and his wife in lieu of rent.

By various state laws, the right of the wife to the use and enjoyment of her property, real and personal, owned by her at the time of her marriage, and the rents, issues and profits thereof are secured to her, and the same are not liable for the debts of her husband (*Chapter 200, Laws of 1848*).

Chapter 90, Laws of 1860, amended by chapter 172, Laws of 1862, provides that a married woman, possessed of real estate as her separate property, may bargain, sell and convey such property, and enter into any contract in reference to the same, with the like effect, in all respects, as though she were single.

The act of 1862 (*sec. 7*) allows any married woman to sue and be sued in all matters having relation to her sole and separate property, in the same manner as though she were sole.

There seems to be no limitation as to the person with whom the wife may enter into a contract, with respect to her separate property.

The legislature having thought proper to pass laws giving to a married woman such power and rights as to her own property, I see no reason why a woman, in contemplation of marriage, may not make an agreement with the person she is about to marry, by which he will pay to her rent for premises belonging to her, in the event that after marriage he should occupy them for his business, and this, although he might occupy them with her; for a husband is bound to support his family, and for this purpose to furnish a home.

Odell agt. Mylins.

In the prosecution of his profession, it was necessary that the husband should have a place to receive the visits of his patients. If for this purpose he chose to occupy a portion of a house owned by his wife, I see no valid reason why he may not, under existing laws, agree to pay for its use.

It is true that the money he paid in this instance went to keep down the interest on the separate estate of his wife; but that constitutes no fraud upon the creditors of the husband, if there was a subsisting agreement between himself and wife, that he should pay such interest, in lieu of rent, for the use of the premises.

Under such an agreement, it is improper to call such payment a gift without consideration. There was a consideration in the use of the premises. Being her own property, she could have leased the same wholly to others, and have received to her own use all the proceeds.

That she chose to occupy, with her husband, the premises, does not, in equity, deprive her of her right to compensation from him for his use of a portion thereof for his professional business.

It is conceivable that such arrangements may give occasion to fraud; but fraud must be proven. It may be that the amount paid for interest on the mortgage is more than the rental value of the premises occupied by the husband for his business; but of that there is no evidence, and I cannot say judicially that it is so. Nor is there any evidence that, at the time the arrangement was made between the defendants as to the payment by the future husband for the use of the premises, he was in debt to any person.

The following cases decide questions in some respects similar to those under consideration, unfavorable to the views of the plaintiff: *Ainsly* agt. *Mead* (3 *Lans*, 120); *Wright* agt. *Wright* (54 *N. Y.* 437); *Mincir* agt. *Mincir* (4 *Lans.*, 421).

I think the plaintiff is not entitled to the relief asked, and his complaint is dismissed, but without costs.

Sweet agt. Chapman.

SUPREME COURT.

SWEET agt. CHAPMAN.

Costs — allowed for reargument.

Where the plaintiff had a verdict at the circuit, the defendant appealed, the general term affirmed the judgment, the defendant moved the general term for leave to go to the court of appeals, the defendant paid the costs of the appeal, including forty dollars for argument. Thereafter the general term ordered a reargument, and upon such reargument granted a new trial, with costs to abide the event. On the new trial plaintiff again had a verdict and taxed the costs, including forty dollars for reargument:

Held, that this item of forty dollars for reargument was properly allowed. The reargument was ordered upon defendant's application, and as the reargument resulted in a new trial being ordered in which plaintiff recovered, he is entitled to compensation for such reargument.

Onondaga Special Term, May, 1877.

MOTION by defendant for a readjustment of costs as to an item of forty dollars allowed for reargument. The plaintiff had a verdict at the circuit, the defendant appealed, the general term affirmed the judgment, the defendant moved the general term for leave to go to the court of appeals. The defendant paid the costs of the appeal, including forty dollars for argument. Thereafter the general term ordered a reargument, and upon such reargument granted a new trial, with costs to abide the event. A new trial was had and the plaintiff again received a verdict, and taxed the costs, including forty dollars, for reargument.

R. H. Tyler, for motion.*Randall & Randall*, opposed.

Sweet agt. Chapman.

HARDIN, J. — A trial is defined to be "the judicial examination of the issue." An argument takes place prior to a judicial decision of the issues in a case. There had been an argument and decision. Costs were allowable, and properly taxed and paid. They were paid "for argument of the appeal," the judgment was affirmed, the costs paid, and, of course, the plaintiff satisfied.

But upon defendant's application a reargument was ordered. He it was who imposed the labor of a reargument that took place, and the court thereupon reversed the judgment and ordered a new trial, with costs to abide the event. The court expressly ordered the costs to abide. That, of course, covered statutory costs to the successful party.

By subdivision 1 of section 306 of the Code, the costs of an appeal are in the discretion of the court when a new trial is ordered. The discretion was, therefore, properly exercised by the general term when it reversed the judgment and ordered a new trial. The plaintiff would have no compensation for the reargument if this item was not allowed (3 *Den.*, 259, *and note*; 1 *How.*, 236; 2 *Hill*, 357).

The motion must be denied, but as the question is novel, without costs of the motion to either party.

Babcock agt. Libbey.

SUPREME COURT.

JOHN B. G. BABCOCK and DANIEL M. PITCHER agt. WILLIAM
LIBBEY, survivor, &c.

*False and fraudulent representations—Fraudulent concealment of facts—
Action for damages—Nonsuit.*

To create a liability for damages consequent upon representations alleged to be false, the plaintiff must show, first, that the representation was untrue; second, that the defendant knew it was untrue; third, that the defendant made the representation with intent to deceive; fourth, that the plaintiffs acted in reliance on the defendant's representation, under circumstances in which they had a right to rely thereon; fifth, that they were deceived thereby, and so induced to change their relation to the subject, to their damage.

The gist of the action for deceit is the fraudulent intent with which the representation is made; that intent is not established by proof merely of the falsity of the representation; knowledge, when it was made, by the party making it, that it was false, must be shown.

The plaintiffs having been applied to, to sell their wool to the steam woolen company, wrote to A. T. Stewart as follows: "The Utica Steam Woolen Company offer to buy of us quite a quantity of wool at four months. Now we understand you are selling their goods, and have a lien, &c., on their mills. If we sell them the amount of wool over 100 M., we shall be obliged to sell some of the paper, perhaps all. Will you buy it? If so, what will you give for it? If you do not feel like taking hold of it, please give us your views as to their ability to pay, and very much oblige." To which, by direction of defendant Libbey, without any knowledge of Mr. Stewart, the following answer was written, upon which the present action was founded: "Your favor of sixth inst., to our Mr. Stewart, is before us. The Utica S. W. Co. consign to us all their goods, for which we have a ready sale. Sometimes sold largely ahead of their product on order. We can only form an opinion of their management from the period they have been in connection with us. As far as we can judge, they have made money. They say they have done better than at any former period. We have taken considerable orders ahead for their spring production, and anticipate a

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good season for their fabrics. 'They have nothing to conceal in regard to their position, and we do not doubt will fairly answer all your inquiries. We never buy paper, either manufacturers' or traders'."

Held, first. That it was true the steam woolen company had so consigned their goods to A. T. Stewart & Co., since August, 1867, and the goods manufactured by the steam woolen company, were sold in advance of their production.

Second. To allow the jury to find that the following statement in defendant's letter, *i. e.*, "As far as we can judge, they have made money; they say they have done better than at any former period," was willfully and fraudulently false, from the ordinary cautions of the commission merchant to his consignor, not to draw drafts in advance of the agreed percentage, or the increase of the firm debt, would be manifestly unsafe. In the absence of preponderating proof in favor of that of guilt, the jury should not be allowed to guess. The presumption of innocence cannot be overcome by showing facts consistent with guilt, but by those which are inconsistent with and negative the former.

Third. Although A. T. Stewart & Co. held, at the time of writing the letter, not only a mortgage upon the real estate and machinery of the steam woolen company, but also a chattel mortgage upon the personal property, of which defendant failed to speak:

Held, that the words in plaintiffs' letter, "Now, we understand you are selling their goods, *and have a lien, &c., upon their mills*," would lead the party to whom such communication was addressed, to suppose that the lien was known to plaintiffs, and that the object of the writer was to ascertain whether A. T. Stewart & Co. would buy the company's paper, and, if not, what were their views as to the ability of the company to pay. No jury would be warranted in finding that the defendant, with intent to deceive, suppressed information as to the liens.

The plaintiffs having been informed as to the lien, and one of them having been in Utica, where the clerk's office of Oneida county is located, before a pound of wool had been delivered, had no right to be deceived. If he made no inquiries, it was such gross carelessness, that it cannot be excused.

The Utica Steam Woolen Company, by its articles of association, ceased to exist February 27, 1866. When the mortgages were made to A. T. Stewart & Co., there was no corporate existence, and no valid liens were thereby created. From the fact that both plaintiffs and defendant dealt with the woolen company, as though its corporate existence had not ended, it is assumed that all were ignorant of its dissolution:

Held, that this action, which rests upon an alleged suppression of the truth as to the existence of supposed liens by mortgage, cannot be maintained when no valid incumbrances in fact existed, and when, consequently, no existing actual fact was suppressed.

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If the defendant intended to deceive the plaintiffs as to the solvency of the woolen company, supposing it to have been a corporation, which it was not, representing it as solvent, believing otherwise, if it was solvent in fact, by reason of the pecuniary responsibility of those who carried it on, the plaintiffs have sustained no damage by such representation.

If the defendant was guilty of subsequent conduct, which induced the plaintiffs to act upon the belief that they had parted with their goods to a corporation, when it had not, and thus lost their remedies, such subsequent conduct, and not the original representation, must be counted upon, and set forth in the pleadings as the ground of recovery.

No rule of law will justify a recovery upon a true representation, because the party making it supposed it to be otherwise.

If the recommendation is of A, and the sale is made to B, no action can be predicated upon it, unless the party recommending, induces the other to believe B is A. When that does not occur, no action will lie.

Ulster Circuit, June, 1877.

ON the trial of this action before judge WESTBROOK and a jury, commencing June 19, and on June 26, 1877, after the plaintiffs had introduced all their evidence and closed the case for the prosecution, the defendant moved for a nonsuit, on the general ground that the testimony was insufficient to establish any cause of action. At the conclusion of the arguments on such motion the opinion was delivered.

James E. Dewey, Henry Smith & Peter Cantine, for plaintiffs.

B. D. Hurlburt, Francis Kernan, Henry E. Davies & F. L. Westbrook, for defendant.

WESTBROOK, J.—This action, originally commenced against Alexander T. Stewart and William Libbey, and now continued against the latter as the survivor of the then firm of A. T. Stewart & Co., was brought to recover damages which the plaintiffs allege they have sustained by the sale of a large quantity of wool, in November, 1868, to the Utica Steam Woolen Company, and which sale, they claim, was induced by the willfully false and fraudulent representations of the said firm of A. T. Stewart & Co. as to the solvency and

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standing of the said steam woolen company, and the fraudulent concealment in the statement of certain facts affecting its credit.

To sustain this action, the plaintiffs must show that the defendant, intending to deceive, made a willfully untrue representation as to the standing of the woolen company, or fraudulently concealed some fact relating to its solvency, under such circumstances that the plaintiffs had a right to rely thereupon; and that, relying thereon, and being deceived thereby, they parted with their goods to their injury (*Brief of Charles O'Connor, in Robinson agt. Flint, 58 Barbour, 135, 136*).

In November, 1868, the plaintiffs having been applied to, to sell their wool to the steam woolen company, wrote to Alexander T. Stewart the following letter:

“OWEGO, TIoga Co., N. Y., Nov. 6, 1868.

“A. T. STEWART, Esq.:

“DEAR SIR.—The Utica Steam Woolen Co. offer to buy of us quite a quantity of wool, at four mos. Now, we understand you are selling their goods, and have a lien, &c., on their mills. If we sell them the amount of wool over 100 M we shall be obliged to sell some of the paper—perhaps all. Will you buy it? If so, what will you give for it? If you do not feel like taking hold of it, please give us your views as to their ability to pay, and very much oblige,

“Yours, respectfully, &c.

“BABCOCK & PITCHER.”

To which letter, by the direction of the defendant, William Libbey, as the proof now stands, and without—so far as the case discloses—any knowledge of Mr. Stewart, the following answer was written, upon which the present action is founded:

“NEW YORK, Nov. 7, 1868.

“MESSRS. BABCOCK & PITCHER, Owego, Tioga Co., N. Y.:

“GENTLEMEN.—Your favor of sixth inst., to our Mr. Stewart, is before us. The Utica S. W. Co. consign to us all

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their goods, for which we have a ready sale — sometimes sold largely ahead of their product on order. We can only form an opinion of their management from the period they have been in connection with us. As far as we can judge, they have made money. They say they have done better than at any former period. We have taken considerable orders ahead for their spring production, and anticipate a good season for their fabrics. They have nothing to conceal in regard to their position, and, we do not doubt, will fairly answer all your inquiries. We never buy paper, either manufacturers' or traders.'

"We are, respectfully,

"A. T. STEWART & CO.

"P. J. DE BROT."

If Mr. Stewart was still living, a preliminary question, could he be held responsible for the tort or deceit of his partners? would be presented. If one member of a firm makes a statement in regard to the business of such firm with another individual, and upon it a third person relies to his injury, then the firm is responsible, because it was a statement — apparently, at least — within the scope of his authority, because relating to the partnership business; and the partner who has formed that relation with the individual making the statement, should rather suffer than the innocent third party who has relied upon such statement. *Griswold agt. Haven* (25 N. Y., 595) depends upon this principle, and was obviously rightly determined. Or if any partner falsely represents the character and quality of the partnership property sold, either by express words or by acts done thereto, which make it seem to be what it is not, the partnership is responsible (*Chester agt. Dickerson*, 52 Barb., 349); but when a false and fraudulent statement is made by one partner as to the standing and credit of a third person, such statement is so evidently not within the duty and power of the partner — that upon no principle apparent to the court can the other partner be held. It is the separate and

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individual wrong of the partner making it, as much so as a separate trespass or battery would be. In view, however, of the death of Mr. Stewart before trial, and the right of the plaintiffs to recover, if at all, against any one of the several defendants, this question has no practical importance.

We are, then, brought to the questions which this case involves upon the merits against the defendant, Libbey. Although that claim has been made, still, in my judgment, there is no sufficient proof to show that any of the statements actually contained in the Libbey letter are false. It was true that the steam woolen company consigned their goods to A. T. Stewart & Co., and had so consigned them since August, 1867, and that the goods manufactured by the woolen company were sold in advance of production. It is not shown that Libbey did not speak the truth when he said, "As far as we can judge, they have made money; they say they have done better than at any former period." To allow the jury to find that such statement was willfully and fraudulently false, from the ordinary cautions of the commission merchant to his consignor, not to draw drafts in advance of the agreed per centage, or the increase of the firm debt, would be manifestly unsafe. Both can be accounted for upon a theory in harmony with the truth of the words; and in the absence of preponderating proof in favor of that guilt, the jury should not be allowed to guess. A bank would not allow a solvent customer, as a rule, to overdraw his account; and the increase of notes at the bank is consistent with an enlargement of business, as well as of loss in its transaction. The presumption of innocence cannot be overcome by showing facts consistent with guilt, but by those which are inconsistent with and negative the former. It is claimed, however, that A. T. Stewart & Co. held, at the time of writing the letter, a mortgage upon the real estate and machinery of the woolen company bearing date January 1, 1868, and then duly recorded in the clerk's office of the county of Oneida, to secure the sum of \$200,000, given

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to secure present and future indebtedness, and also a chattel mortgage dated February 1, 1868, for the sum of \$300,000, upon the personal property, given for a similar purpose, and filed in such clerk's office, of which the defendant failed to speak, and all information in regard to which was fraudulently suppressed.

The point made in behalf of the plaintiffs overlooks the force of the letter written in their behalf. In that, it is stated, "Now, we understand you are selling their goods, *and have a lien, &c., upon their mills.*" Would not the party to whom such a communication was addressed naturally suppose that the lien was known, and that the object of the writer was to ascertain whether A. T. Stewart & Co. would buy the company's paper, and if not, what were their views as to the ability of the company to pay? It seems to us that the letter can only have this reasonable construction, and when what was actually said was, for aught that appears, literally true, and the plaintiffs were fairly referred to the company itself in these words: "They have nothing to conceal in regard to their position, and we do not doubt will fairly answer all your inquiries," that no jury would be warranted in finding that the defendant, with intent to deceive, suppressed information as to the liens. From the language of the two instruments it is apparent that the real estate and the chattel mortgage, covered the same demands. They were both given to secure present and future debts, such as any one might naturally imagine, from the nature of the business, that the manufacturer would owe to the commission merchant to whom the manufactured goods were consigned for sale, and information, therefore, of one which is confessed applies to the other.

In determining the question whether the defendant has been guilty, or not, of a fraudulent concealment of the alleged chattel mortgage, the peculiar form of the expression in plaintiffs' letter must not be overlooked. They declare that they understand not only that Stewart has "a lien" on the "mills," but a something else, which they designate by "&c." It

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evidently conveys the idea that plaintiffs knew A. T. Stewart had something affecting the mills besides that which they called "*a lien*." If the lien was understood to refer to the real estate mortgage the "&c.," which also affected the same property, meant something else in addition. What would the business man, and not the lawyer, to whom the letter was written, naturally suppose the writer meant? Would it not be, as the real mortgage was referred to and covered by the word "*lien*," that the "&c." referred to the chattel mortgage, as nothing else affected that property? We are not to construe this letter in the light of the evidence given upon this trial, showing that plaintiffs were ignorant of the chattel mortgage, but by the light which the person to whom it was addressed had. Would he understand from the form of expression any more than this: "You have a real estate mortgage, and something else affecting the mills?" Were the expression in that form, we would have no trouble. Is it different? It was a "*lien*" and a something more. What inference could the party writing the answer have drawn other than indicated? If, however, no force is to be given to the expression "&c.," would not the receiver of the letter suppose that the word "*mills*" included the machinery as well as the building, and as the lien on both was created by the two mortgages, that the expression included the two. One or the other of these impressions, would, it seems to us, be naturally created in the mind of the business man receiving the communication, and hence no fraudulent and willful concealment can legally be found.

Again, the plaintiffs having been informed as to the lien, and one of them (Mr. Babcock) having been in Utica on the 17th of November, 1868, where the clerk's office of Oneida county is located, before a pound of wool had been delivered, had no right to be deceived (*Coven* agt. *Simpson*, 1 *Exp.*, 290; *Brown* agt. *Costello*, 11 *Cush.*, 348, *see p.* 350; *Moony* agt. *Miller*, 102 *Mass.*, 217, *see p.* 220; *Davis* agt. *Sims & Bates*, 7 *Barb.*, 64; *White* agt. *Seaver*, 25 *id.*, 235-242; *Clark*

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agt. *Rankin*, 46 *id.*, 579). It is almost incredible to suppose that Mr. Babcock did not, on the 17th of November, 1868, inquire at the Oneida county clerk's office in regard to the liens. The excuse for his being at Utica on that day with Mr. Hemingway, the broker, who made the sale of the wool, and that he made no inquiries, is not very reasonable. Assuming, however, that he did not, it was such gross carelessness that it cannot be excused. The plaintiffs having knowledge of one lien, at least, held by the firm of A. T. Stewart & Co., upon the property of the woolen company, and having made no specific inquiry in relation thereto in their letter, but, on the contrary, having referred to it in such a way as to throw the answerer of the letter off his guard in relation thereto, and having abundant means and opportunity to inquire and learn, had no right to assume that because nothing was said in the Libbey letter about liens, there were none. To allow a recovery under such circumstances, for a supposed willful suppression of truth, would be manifestly unjust.

There is another answer to the alleged suppression of the truth by Mr. Libbey, which seems conclusive. The Utica Steam Woolen Company, by its articles of association, filed February 27, 1846, was to exist only twenty years. No steps had been taken to prolong its life. It ceased to live February 27, 1866. From that time its then directors managed its business, and they were empowered by statute (1 *Edmonds' Statutes at Large*, 557, *sec.* 9) to wind up its affairs and distribute its assets. Instead of closing up the company they continued its business, and transacted its concerns as though still in life. The business, after the corporation had ceased to exist, was conducted by Peter Clogher, as agent, as he had done previously. Clogher was clearly not the agent of the dead company, and his occupation of the mills and assumption of the title of agent must have been known to them. The trustees upon such a point cannot plead ignorance. The property was in their hands by operation of law, and they are chargeable with complete knowledge as to its use and of their

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status in regard to it. As Clogher, with their knowledge, held himself out to the world as their agent, it follows that, for debts thus contracted, they were clearly, as it seems to us, individually responsible (*Fuller agt. Rowe*, 57 N. Y., 23). When the mortgages were made to A. T. Stewart & Co. there was no corporate existence, and no valid liens were thereby created. From the fact that both plaintiffs and defendant dealt with the woolen company as though its corporate existence had not ended, it is assumed that all were ignorant of its dissolution. What *fact*, then, did the defendant suppress in the letter? If he had said his firm held liens upon the property it would not have been true, for it had none, though it apparently had two. The alleged mortgages were not what they seemed to be, and, if there was any suppression, it was not of the truth but only of what seemed so to be, whilst it was otherwise in fact. It is not seen how such an alleged suppression can give a cause of action, because no existing fact is withheld. On the contrary, the statement of an existing lien by mortgage would not only have been untrue, but would have worked an injury to all parties interested. Had the whole truth been disclosed, the plaintiffs would have been told that the corporation had ceased to live; that the apparent liens held by A. T. Stewart & Co. were not so in fact, as the corporation had, at the time of the execution of the instruments which it was supposed created them, no legal existence, and that several individuals, abundantly responsible, would be the real buyers of the property sold. That such information was not communicated was doubtless owing to want of accurate knowledge. That, however, and only that, would have been true, and hence it is not seen how this action, which rests upon an alleged suppression of the truth as to the existence of supposed liens by mortgage, can be maintained, when no valid incumbrances in fact existed, and when, consequently, no existing actual fact was suppressed. The plaintiffs, however, answer that a paper purporting to create a lien was on file, and that fact was not

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disclosed. This is true; and yet, if the filing of the supposed mortgage had alone been stated, it would have created a false impression, for, without any explanation, it would, contrary to the fact, have been assumed to be a valid lien. The position of the plaintiffs, then, is this: The defendant, to escape the consequences of an alleged suppression of the truth, should have stated an untruth. He should have declared his firm had a lien by chattel mortgage, when it had none in fact. In short, when a fraudulent representation or concealment of an existing fact is required to recover, the plaintiffs propose to make an unstated untruth answer a similar purpose, and they thus in effect argue that an intention to conceal the truth is equivalent to an actual concealment. Such reasoning cannot be sound, for by it the vendor of property, who believed that it had a secret defect, when it had not, the supposed existence of which he carefully and with intent to defraud concealed, would be responsible in damages, though no such defect, as he believed, in fact existed. I am aware that this argument rests upon the position that the chattel mortgage is a nullity, and that this proposition is disputed. Our reasons for supposing so are these: First. It could not affect or bind the property described in it, formerly held by the defunct corporation, for that had ceased to exist, and its trustees had no power to mortgage to continue business. Second. It could not affect subsequently-acquired property, because the authority of Peter Clogher to give it is not shown. Third. It professes to be given for a corporation which had ceased to exist, and for no other party whatsoever. Neither has the fact been overlooked that in 1869, by subsequent agreement between Stewart & Co., the dead company, its shareholders, trustees and creditors, it was treated as, and, in fact, made a valid instrument. That could not relate back to 1868, and make a fact as so existing at that date, which was none actually. If no truth was suppressed in 1868, which was not then a truth, it cannot be made so by what happened in 1869. Whether such after-occurring

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events do or do not give a cause of action, will be presently considered.

Assuming now, for the sake of argument, that the plaintiffs have been deceived by the defendant as to the condition of the woolen company, let us next inquire how have they been damnified thereby, for damages must also accrue therefrom to sustain the action (58 *Barb.*, 136-138; 1 *Espinasse*, 290, *note to case*; *Upton* agt. *Vail*, 6 *Johnson*, 184; *Marsh* agt. *Falker*, 40 *N. Y.*, 562, *see note at end of case*). A reference to the complaint will show that the *gravamen* thereof rests upon the assumption that the woolen company, on the day when the defendant wrote to the plaintiffs, was insolvent, and that it was fraudulently and deceitfully and falsely represented to be otherwise. The sale, it claims, was made in the belief of its solvency, but being otherwise, loss was sustained. To sustain the action, then, a willfully *false* statement must have been made. The woolen company, as has already been seen, was not what both parties supposed it was. It was not a corporation, but an individual organization operated by responsible parties. The sale of the plaintiffs, though, to the Utica Steam Woolen Company, in fact, was not to it as a corporation, but to it as a partnership of individuals, who were abundantly able to pay its debts. Will it be seriously contended that when A fraudulently represents B to C as fit to be trusted, believing at the time B to be a person other than he in fact is, and utterly worthless, in which supposition he was mistaken, B being abundantly responsible, and not the individual he was supposed to be, that A is liable? He certainly would not be, because the representation was true, though it was supposed when made to be false. If, however, the true identity and circumstances of B become known, and A is guilty of the further fraud of concealing the identity, and induces C to act upon such mistake, the remedy must be on the latter fraud, and not upon the original representation, which was true. By the complaint, the case is put upon no such ground. All parties, in Novem-

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ber, 1868, supposed the Utica Steam Woolen Company to be a corporate life, and the fact it was not is not alleged to have been concealed. The fraud is averred to be that *the* company was represented, by means of positive statement and suppression, to have been solvent, when it was otherwise. The truth is, that *the* company was solvent, and hence, if it was by defendant held out to the plaintiffs as responsible, such holding out was true, though the defendant fraudulently made the statement. If the seller of goods ignorantly believes that the goods sold are not what he represents them to be, and the buyer purchases believing them to be what they are represented, the latter could sustain no action upon the ground that the seller meant to misrepresent, but did not. And so in this case, if the defendant intended to deceive the plaintiffs as to the solvency of the woolen company, supposing it to have been a corporation, which it was not, representing it as solvent, believing otherwise; if it was solvent in fact, by reason of the pecuniary responsibility of those who carried it on, the plaintiffs have sustained no damage by such representation. If the defendant was guilty of subsequent conduct, which induced the plaintiffs to act upon the belief that they had parted with their goods to a corporation, when it had not, and thus lost their remedies, such subsequent conduct, and not the original representation, must be counted upon, and set forth in the pleadings as the ground of recovery. There was no misstatement by the defendant in his letter, even though it be capable of the construction claimed by the plaintiffs, and though the defendant intended all the fraud imputed to him. The woolen company was solvent, and the sale to it was caused by no false representation, though it may have been supposed by the utterer thereof so to be. Conceding to the plaintiffs that the proof establishes all they claim, that the letter and the alleged concealment were designed to represent the perfect solvency of the woolen company, when they supposed it to be otherwise, the fact remains that the representation was true in fact. No rule of law, with which I am

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acquainted, will justify a recovery upon a true representation, because the party making it supposed it to be otherwise. Such a rule would certainly not sustain an action to recover damages upon goods sold, nor for trusting a party, when the representation was literally true.

We have certainly assumed the liability of the trustees for the debts contracted after the corporation had expired. Their duty was a simple one created by statute. It was to wind up, pay debts and distribute assets. Instead of so doing, the business of manufacture was allowed to be carried on in the property, and the former agent to still act as such. They must be chargeable, as has before been stated, with knowledge of the use of that which is in their care, and of their status in regard to it. The stockholder has no such duty, and without an active participation could not be made liable for debts. But he who holds the property and controls it, can take no such ground, knowing, as they must be presumed to know, Mr. Clogher's position, and that he could not act for a dead corporation, and that he must therefore have acted for them, their individual liability follows.

There is still another thought in connection with the absence of damage, resulting from the alleged fraud, which is worthy of consideration. It has thus far been argued upon the ground taken by the plaintiffs, that the recommendation was of the woolen company, and the sale to it, without regard to the fact of its being or not being a corporation, and we have endeavored to show that no action would lie, because the company, viewed as a partnership, was solvent. Is not this view, however, more favorable to the plaintiffs than they are entitled to? It is conceded that the plaintiffs wrote their letter supposing that the woolen company was a corporation, and that the defendant wrote of it, supposing it to have that status. Assuming these facts, which are conceded, does it not follow that the recommendation was of a corporation, and as no sale was made to it, but to individuals, the trustees as individuals, Clogher or somebody, that such recommendation worked no injury?

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If the recommendation is of A, and the sale is made to B, no action can be predicated upon it, unless the party recommending induces the other to believe B is A. When that does not occur, it is not seen how an action will lie. The party chooses his own purchaser; he determines for himself who and what he is. He asks about some one who he thinks is going to buy, and gets a recommendation of that party, and then if whilst supposing he sells, the party recommended, he in fact sells to some other person or persons, what has the recommendation to do with the loss? Placing the parties where they stood when the letters were written, and looking into their minds when they used the expression, "The Utica Steam Woolen Company," as we must do, when judging of this case, is it not clear that the inquiry and answer were concerning a supposed entity, when the sale was not in fact made to it; and no such sale being made to it, is it not also clear that for this reason likewise the action must fail?

The motion for a nonsuit must be granted.

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N. Y. COMMON PLEAS.

HENRY F. PULTZ agt. GEORGE S. DIOSSY.

Appeal—Judgment by default.

Where, in an action in a district court, the defendant appeared and joined issue, the cause being adjourned, and upon the adjourned day the defendant failed to appear, the plaintiff took judgment by default:

Held, that an appeal would lie to the general term of the common pleas to reverse the judgment upon error.

In such a case the plaintiff, though the defendant failed to appear upon the adjourned day, is bound to establish his cause of action by evidence, and if he has not done so the judgment will be reversed.

Nor is a defendant, in such a case, required to make a motion in the court below to open the default, as such an application is made to the favor of the court and is one in which conditions may be imposed; but if the judgment was rendered without sufficient evidence to warrant it, the defendant has the right to have it reversed by an appeal to the tribunal that has the authority to review it.

Special Term, April, 1877.

THIS action was brought in the first district court of the city of New York.

On the return day, when the defendant answered in the court below, the action was adjourned by common consent. On the adjourned day the defendant was in court with his attorney and witnesses ready for trial. The plaintiff asked for and obtained an adjournment. On the adjourned day the defendant was again in court with his attorney and witnesses ready for trial. The plaintiff again applied for and obtained an adjournment. On the next adjourned day the defendant was sick and unable to attend court; this was stated to plain-

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tiff and the court, and an affidavit made and an adjournment applied for by defendant's attorney on that ground, which was denied, and plaintiff entered a judgment by default.

Defendant applied to the court below to have the default opened, and to try the cause there, which application was resisted by plaintiff. The default was opened by the court on condition that defendant pay plaintiff ten dollars costs.

The defendant has duly appealed to the general term of this court, from the judgment entered against him for sixty-nine dollars, in the first district court, on the ground that no evidence whatever was given in the court below to warrant or support the judgment.

The plaintiff now moves to dismiss such appeal, on the ground "that no appeal lies from a judgment taken by default, and also that the defendant, appellant, obtained all the relief under the order opening his default in the court below that he could be entitled to on the appeal if successful.

DALY, C. J.—A judgment by default from which no appeal will lie, is one where the defendant neglected to appear at all, a judgment under such circumstances being regarded as equivalent to a confession of judgment; and the only remedy which a defendant has in such a case is a motion to the court to open the default, which is a motion to the favor (*Maltby agt. Green*, 3 *Abb. Ct. App. Dec.*, 147; *Adams agt. Oakes*, 20 *Johns.*, 284, 285). By the Code, an appeal would lie to this court from a judgment where the defendant failed to appear before the justice, if he excused his default and showed that manifest injustice had been done, which had to be established by affidavits served with the notice of appeal. If the defendant, however, appeared, and put in an answer upon which the cause was adjourned to a future day, and he failed to appear upon that day, no appeal would lie to open it as a default, it not being a case in which the defendant, in the language of the Code, "had failed to appear" (*Wilde agt. N. Y. and Harlem R. R. Co.*,

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1 *Hilt.*, 302; *Dunker* agt. *Latchman*, 1 *E. D. Smith*, 410; *Edwards* agt. *Doe*, 2 *id.*, 56; *Story* agt. *Bishop*, 4 *id.*, 423).

In such a case, however, an appeal will lie to reverse the judgment for error, and it will be reversed if it appears by the return that it was not warranted by the evidence (*Hunt* agt. *Westervelt*, 4 *E. D. Smith*, 225; *Story* agt. *Bishop*, *id.*, 423; *Teas* agt. *Christie*, 2 *id.*, 638).

It is not necessary to consider whether the power given by the statute (*chap.* 484, *p.* 975) has abrogated the power of this court to open judgments upon default by appeal where the default is excused, and it is shown that manifest injustice has been done, as this is not the kind of judgment by default in which the defendant failed to appear, which is considered as equivalent to a confession of judgment; but one in which he did appear and joined issue, and upon which an appeal would lie to reverse the judgment upon error, as in such a case the plaintiff, though the defendant failed to appear upon the adjourned day, is bound to establish his cause of action by evidence, and if he has not done so the judgment will be reversed. There is no ground, therefore, for a motion at the special term to dismiss the appeal, because the defendant failed to appear on the adjourned day to try the issue; nor in such a case is a defendant required to make a motion in the court below to open the default, as such an application is made to the favor of the court, and therefore one in which conditions may be imposed; but if the judgment was rendered without sufficient evidence to warrant it, the defendant has the right to have it reversed by an appeal to the tribunal that has the authority to review it (*Howard* agt. *Brown*, 2 *E. D. Smith*, 247; *Alburtis* agt. *McCready*, *id.*, 39; *Everett* agt. *Parks*, 62 *Barb.*, 9, 15; *Northrup* agt. *Jackson*, 13 *Wend.*, 85).

The motion to dismiss the appeal, therefore, must be denied.

Paine agt. Noelke.

N. Y. SUPERIOR COURT.

WILLIAM PAINE agt. CHARLES D. J. NOELKE and ROBERT
NOELKE.*Complaint — Demurrer — Non-negotiable note.*

One who indorses his name on a *non-negotiable promissory note*, before its delivery by the maker to the payee, is, in effect, himself a maker of the note; and his name, equally with that of the maker who subscribes it, imports an absolute liability for its payment at maturity.

Where it appears from the complaint that one of the two defendants made the note in suit in favor, but not to the order, of the plaintiff, the payee therein named, that the other defendant indorsed it, and that it was thereupon delivered to the plaintiff:

Held, that these averments, taken together, must be deemed equivalent to an allegation that the two defendants made the promissory note, and that both are jointly liable as makers thereof.

Although not negotiable, the instrument is a promissory note, and, as such, imports a consideration, though none is expressed. Want of consideration is matter of defense.

Special Term, June, 1877.

DEMURRER to complaint, on the ground that it does not state facts sufficient to constitute a cause of action.

The complaint was in substance as follows:

The plaintiff above named complains of the defendants above named, by C. Edgar Smith, his attorney, and respectfully states to this court:

I. That on the first day of June, 1874, at Bergen, in the state of New Jersey, the defendant Charles D. J. Noelke made his certain promissory note in writing, dated on that day, and thereby promised to pay to the plaintiff the sum of

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\$1,000, with interest, payable semi-annually, one year from said date.

II. That the defendant R. Noelke indorsed said note when said Charles D. J. Noelke delivered the same to the plaintiff.

III. That said note at maturity was duly presented for payment to the said Charles D. J. Noelke, but was not paid, of all of which due notice was given to the defendant R. Noelke.

IV. That no part of said note has been paid, except the sum of three dollars, paid on the 17th day of June, 1876 ; and the sum of three dollars, paid on the 24th day of June, 1876 ; and the sum of six dollars, paid on the 15th day of July, 1876 ; and the sum of three dollars, paid on the 22d day of July, 1876, amounting to the sum of fifteen dollars.

Wherefore plaintiff demands judgment, &c.

C. E. Smith, attorney for plaintiff.

James Wiley, attorney for defendant ; *H. C. Anderson*, of counsel.

SANFORD, *J.*—One who indorses his name on a *non-negotiable promissory note*, before its delivery by the maker to the payee, is, in effect, himself a maker of the note ; and his name, equally with that of the maker who subscribes it, imports an absolute liability for its payment at maturity. He is presumed, in law, to have thus affixed his signature for the purpose and with the intent of charging himself with liability, in order to give credit to the instrument in the hands of the payee, or of any subsequent holder deriving title from the payee. His contract is not that of an indorser, because the note is not payable to him, and is not negotiable by his indorsement. A different obligation is, therefore, to be inferred — “*ut res magis valeat quam pereat.*” Such obligation must, of necessity, be either that of maker or guarantor, and the better opinion seems to be that the con-

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tract should be construed as an absolute promise to pay as a maker of the note (*Richards* agt. *Waring*, 39 *Barb.*, 42; *affirmed*, 1 *Keyes*, 576). Inasmuch, therefore, as it appears from the complaint that one of the two defendants made the note in suit in favor, but not to the order, of the plaintiff, the payee therein named; that the other defendant indorsed it, and that it was thereupon delivered to the plaintiff; and, inasmuch as such an indorsement before delivery imports the liability of a maker, these averments, taken together, must be deemed equivalent to an allegation that the two defendants made the promissory note, and that both are jointly liable as makers thereof. Although not negotiable, the instrument is a promissory note, and, as such, imports a consideration, though none is expressed. Want of consideration is matter of defense.

The non-negotiable character of the note in suit distinguishes this case from *Murphy* agt. *Merchants* (14 *How. Pr. Rep.*, 189), *Smith* agt. *Smith* (37 *N. Y. Super. Ct.*, 203), *Coulter* agt. *Richmond* (59 *N. Y.*, 478) and from *Draper* agt. *The Chase Manufacturing Company* (2 *Abb. [N. C.]*, 79).

The demurrer must be overruled, and judgment rendered in favor of the plaintiff thereon, but with liberty to the defendant to answer, upon payment of costs, within twenty days.

Sage agt. Lockman.

SUPREME COURT.

GARDNER A. SAGE, jr., agt. JACOB K. LOOKMAN, executor,
&c., and others.

Conversion — discretionary power to sell real estate — Descent

A mere discretionary power to sell real estate does not create a conversion. Upon the death of the *cestui que trust*, the estate descends directly to the persons entitled, and the power of sale, as to such share, ceases.

Special Term, May, 1877.

VAN BRUNT, J. — It seems to me very clear that the power of sale given by the testator to his executors by the seventeenth clause of his will, was merely discretionary. The devise and bequest is of the residue of the testator's real and personal property to his executors, in trust, to sell and dispose of any portion or portions thereof, at public or private sale, at their discretion, &c. If there was nothing but this clause to indicate the intentions of the testator, the intention to give the executors a discretionary power of sale would be sufficiently apparent, as the executors are to sell any portion or portions of the estate at their discretion.

But, as if to remove all doubt as to such intention, the testator, by the seventh subdivision of the seventeenth clause, provides that the executors shall divide all the rest, residue and remainder of his estate, real and personal, into equal shares, &c. Now, if the testator had supposed that the previous authorization to sell was obligatory upon the executors he certainly would not have contemplated a violation of that direction by them and spoken of a division of his real estate

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as above mentioned. But this language would be entirely consistent with the idea that the executors were to have a discretionary power to sell. It is well settled in this state that a mere discretionary power to sell real estate does not create a conversion (*White et al. agt. Howard*, 46 N. Y., 144).

The case of *Bruner agt. Meigs*, decided by me at the special term and affirmed in the court of appeals (64 N. Y., 506), expressly decides that upon the death of the *cestuis que trust* the estate descended directly to the persons entitled, and that the power of sale, as to such share, ceased.

This case appears to be decisive of the only remaining question in this case, and to establish the proposition that upon the death of Frances Sage, her interest or share in the testator's estate descended directly to her children, released from the power of sale contained in the will.

The demurrer must therefore be overruled, with leave for the defendants to answer upon usual terms.

Gopen agt. Crawford.

SUPREME COURT.

JONATHAN K. GOPEN agt. HENRY CRAWFORD.

Moneys had and received — Tort — Attorney at law — Counter-claim.

Where a party brings an action for money had and received, for the purposes of the action, he waives a tortious receiving or withholding the money.

The character of the action is determined by the complaint, and not by the form of the summons.

An allegation that the defendant "received the money as an attorney at law," does not necessarily make his refusal to pay over wrongful. He may still have a valid ground for holding on to the money. To have that effect, it must be alleged that he wrongfully withholds the money. To an action brought against an attorney at law for moneys received by him as such, he may set up by way of counter-claim a demand in his favor against the plaintiff for services rendered.

Special Term, January, 1875.

DEMURRER to answer.

- VAN VORST, J.—The complaint in this action is not founded upon a tort, but is rather for the recovery of money had and received by the defendant to the plaintiff's use, and which, as is alleged, he has refused to pay over.

If the plaintiff had a cause of action "*ex delicto*," he has waived it for the purposes of this action, and, if he succeeds, it must be for the cause of action set up in the complaint. The receipt of the moneys by the defendant was lawful, and his failure to pay it over, on demand, renders him liable to the plaintiff for moneys had and received. There is no allegation of wrong or misfeasance, so as to characterize the defendant's act as tortious.

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It does not change the character of the complaint in this regard, that the summons is under the second subdivision of section 129 of the Code, and contains a notice for relief.

When the action comes to be tried, it must be on the allegations of the complaint, by which the plaintiff must stand. Nor does the allegation that defendant is an attorney at law, and that he received the money as plaintiff's attorney, necessarily make his refusal to pay over tortious. The complaint, to have that effect, should contain allegations charging the defendant's acts as wrongful.

His refusal to pay over the moneys may be lawful. He may have a lien thereon, or a claim against the plaintiff in excess of the moneys in his hands. The action, then, being on contract, the counter-claim, setting up a cause of action arising on contract, existing at the commencement of the action, is proper to be pleaded by way of answer (*Code*, 150).

The defendant's answer and counter-claim show that the cause of action in his favor existed at the time of the commencement of this action. If for any cause it is indefinite or uncertain, the remedy is not by demurrer, but by motion.

Having set up his retainer by the plaintiff, the amount he will be entitled to recover will depend upon the facts proved. That he now claims, what in the trial he may prove, a wrong basis of compensation is no ground of demurrer in itself. If he was retained he will be entitled to recover some amount, whether it be taxable costs, or the value of his services, or some amount agreed upon, unless he has been already paid.

There should be judgment for the defendant on the demurrer, with liberty to the plaintiff to reply, on payment of costs.

People *ex rel.* Myer agt. Board of Assessors.

SUPREME COURT.

THE PEOPLE, &c., *ex rel.* WILLIAM MYER agt. THE BOARD
OF ASSESSORS OF THE CITY OF NEW YORK.

THE PEOPLE, &c., *ex rel.* WILLIAM MYER agt. ANDREW H.
GREEN, Comptroller of the City of New York.

Mandamus — assessment of damages by reason of change of grade of a street.

Mandamus is the appropriate remedy to compel the assessment of damages done by reason of the change of the grade of a street.

It is the duty of the board of assessors of the city of New York to estimate such damages when applied to, notwithstanding the expense of the work of conforming to the new grade has not been certified to them.

Where a statute directs payment to be made in a particular manner, as by the issue of assessment bonds, the comptroller may be compelled by *mandamus* to act as directed by the statute.

General Term, First Department, October, 1875.

APPEAL from order denying motion for peremptory writ of *mandamus*.

James A. Deering, for appellant.

William Barnes and *E. Delafield Smith*, counsel to corporation, opposed.

DANIELS, J. — The person named as relator in this case, and Frederick S. Heiser in the same form in another case, upon similar facts, applied, upon notice served upon the board of assessors, for writs of peremptory *mandamus* directing the board to make and file an award of the damages sustained by them respectively from a change made by rais-

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ing the grade of Eighth avenue in the city of New York. Their right to damages was not denied; but the board seems to have declined to make the assessment, because the list had not been received from the department of public works. That appears to have been shown, in the case of Heiser, by an affidavit of one of the assessors, and from the order which was made in the case of Meyer, the same fact was probably established in the same way, although the affidavit has not been printed in the case. It was argued upon the assumption that such was the fact, and may, therefore, be considered and decided upon that circumstance practically conceded.

When the enactment was made for changing the grade of Eighth avenue, it contained no express provision for compensating the owners of property who might be injured by the work (*Vol. 2, Laws of 1870, 1861, chap. 593*). This omission was afterwards supplied by another act (*Laws of 1872, vol. 2, 1726, chap. 729*). The work itself was provided for by chapter 580, volume 2 of the Laws of 1867, which amended and re-enacted a law of the preceding year upon the same subject; and the act (*chap. 593 of the Laws of 1870*) simply made a further change in the grade prescribed for the avenue, and required the duties incidental to the performance of the work to be done by other persons than those mentioned in the law of 1867. All the laws upon the subject were designed to form a complete system, under which the change in the grade was made and the work was to be done, and its expenses, including damages, assessed and paid.

It was made the duty of the commissioner of public works to grade and regulate the avenue, as the law provided it should be done, and make contracts for the performance of the work, and the expense of that was to be certified in order that the assessment of it could properly be made upon the property benefited by the improvement (*Laws of 1867, 1558, 1559*). The assessment itself could not intelligently be made by the board of assessors until a report of that expense was

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received, and that had not been certified to the assessors at the time when the applicants applied to their board for the assessment of their damages. For that reason their applications were deemed premature by the board, and for the same reason their motions for writs of *mandamus* were denied.

The presence of the certificate or of any assessment list was not necessary; neither was either required before the award for damages could be made. That was only needed for the purpose of enabling the board of assessors to assess the expenses and the damages on the property benefited by the improvement. Before the damages could be included in such an assessment the act of 1872 required an award of them to be made and filed.

After that had been done, and when the assessment came to be made out, it was required to include the amount of the awards for damages. The act of 1872 not only authorized, but it in terms directed the board of assessors to make and file in the finance department of the city a just and equitable statement of the amount of the damage, loss or injury which the owner or owners of buildings fronting on the avenue and opposite to the improvement sustained by the change of grade provided for by Laws of 1872, 1726, chapter 729. The direction was unqualified and not in any sense rendered dependent on any certificate or assessment list received from any source whatsoever. The right was unqualified and absolute; for the statute directed the assessors to do it, and the award was required to be made and filed and included in the expense to be afterwards assessed by the board. No complete assessment could be made without it, and the statute could only be complied with by having the award made first. A positive right was given and duty created, and neither, in any manner, was rendered dependent on any other officer or board than the board of assessors, which was explicitly required to hear the cases and make the awards. The statute prescribed no time in which this should be done; but it took effect immediately, and by fair construc-

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tion necessarily contemplated that it should be done within a reasonable time (*Doughty agt. Hope*, 3 *Denio*, 249; *People agt. Mayor, &c.*, 5 *Barb.*, 43), and that certainly had expired when the claims were presented by the applicants, and before the present proceedings were instituted, which was in the summer of 1875.

The objection to the application, that the assessment cannot be made, or the amount raised to pay the award, before the expense has been certified to the board of assessors, forms no legal answer to it. Making the awards may not accelerate the period for their payment, and probably will not; but it is not for payment that the parties have applied. It is for the hearing and investigation of their claims for damages, and the making and filing of the awards they may establish their right to, that they have applied, and the right to have that done has been provided for and directed in plain terms by the statute. If they are either of them entitled to damages, when the assessments are made out, the amount will be included in it, and that cannot be done without an award. The hearing and disposition of the claims made are precedent acts, and require nothing but the claims themselves to enable the board of assessors to act upon and dispose of them. The right, as well as the duty, are both defined by the statute, and the board should have investigated the cases when they were applied to for that purpose; no other remedy exists for the applicants than that applied for by them. For that reason, the case is a proper one for the writ of *mandamus*, and as the facts and the law are clearly in their favor, the relief applied for by the applicants should be awarded to them.

It was insisted that section 3 of chapter 52 of the Laws of 1852 was adverse to this conclusion; but nothing of that nature is contained in it. On the contrary, it also contemplates the making of awards for damages before the expenses incurred can properly be assessed upon the property benefited; but as the act of 1872 was enacted for the government

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of claims arising out of the particular improvement made by changing the grade of Eighth avenue, and was in no way rendered dependent for its efficiency or force upon any thing contained in the act of 1852, it cannot be necessary to look beyond its provisions for the disposition which should be made of these cases.

The orders made should be reversed, with ten dollars costs, in addition to disbursements in each case, and the writs directed to be issued requiring the board of assessors to hear and determine the claims made, and to make and file their awards in case the damage claimed, or any part thereof, appear to have been occasioned by the improvements.

The order of the general term was affirmed in court of appeals, February 19, 1876, on the opinion of DANIELS, J.

The board of assessors, on the twenty-eighth day of March, filed with the comptroller a statement wherein the sum of \$2,500 was awarded to the relator, Myer. The comptroller refused to pay upon demand, and a motion was then made before DONOHUE, J., for a peremptory *mandamus* to compel payment. The motion was granted, and an appeal taken to the general term.

William C. Whitney, counsel to the corporation, and *Hugh L. Cole*, for the comptroller, appellant.

James A. Deering, for respondent.

General Term, First Department, March, 1877.

DAVIS, P. J. — The affidavit on which the motion was founded states that the board of assessors of the city of New York, under and pursuant to the provisions of section 1 of chapter 729 of the Laws of 1872, on or about the 28th day of March, 1876, made and filed in the finance department a just and equitable statement of the amount of the damage, loss or injury to the owner or owners of the building or buildings fronting on Eighth avenue, between Fifty-ninth

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street and One Hundred and Twenty-second street, by reason of the change of grade, &c., of said avenue, heretofore authorized to be made by the legislature, or by any officer or board of the city of New York, and proceeds to state the amount of damages assessed to the relator.

This allegation is not denied. The answer asserts simply that the alleged award or assessment for the relator's damage has not been confirmed by the board of revision and correction or by any other lawful authority.

By the act under which these awards are made, there is no provision for their confirmation by any board or body. It simply directs the assessors to ascertain the damage, and to file, in the finance department, a just and equitable statement and award of their amount, and that the award thus made shall be included in the expenses of regulating, grading and improving the said avenue, and that such expenses shall be assessed as provided by law.

Nothing is left to be done in respect to such awards, except so far as relates to their inclusion in the assessment roll for the expenses of the work.

The second section authorizes and directs the comptroller to issue bonds to pay the amount of such loss or damage so assessed by said board of assessors, together with the amount that might be necessary to pay the expenses that have been, or may hereafter be, necessary for the regulating, grading and improving of said avenue.

It does not appear, in the papers in this case, whether or not the assessment list of the damages and expenses of the improvement has ever been made or confirmed.

The only point of objection put forth on the part of the respondent is, that the order awarding to the relator damages has not been confirmed by the board of revision and correction. As nothing of that kind was necessary under the act in question, no reason is shown why the award should not be paid in the manner provided by the act.

The order granting the writ should be affirmed.

Le Baron agt. Long Island Bank.

SUPREME COURT.

CALEB B. LE BARON agt. THE LONG ISLAND BANK and
GEORGE G. SAMPSON.

An executor cannot pledge property of the estate as security for loans to himself individually.

Where a person advances money to one of two executors and receives as security therefor scrip of bank stock belonging to the estate, he having at the time reason to know and believe that the money was not borrowed for the benefit of the estate but for the private use of such executor,

Held, that the lender of the money cannot hold the stock as security for the advances, nor compel a transfer to him of the stock on the books of the bank.

Special Term, April, 1876.

Lucien Birdseye, for plaintiff.

S. P. Nash, for defendants.

VAN VORST, J. — The executor is the owner of the personal property of the testator. The absolute title rests in him and he possesses the "*jus disponendi*" in its full force. The honest purchaser is under no duty to see that the moneys are faithfully applied by the executor. This was decided in *Leitch et al. agt. Wells et al.* (48 N. Y., 586, HUNT, J.). A person dealing in good faith with an executor would have a right to presume that in selling the personal property of the estate he was doing so for the purposes to which he was

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authorized. And acting in good faith, without notice to the contrary and for a good and sufficient consideration, would, without doubt, be protected in his action.

But if he knew, or had sufficient reason to believe, that the property was not disposed of for the purposes of the estate, to raise money for the payment of debts of the testator, or for the discharge of legacies or other legal ends, but, on the contrary, that the executor was selling or pledging the property to raise funds to pay his own individual debts, or to raise moneys for his own use, he cannot be said to be a *bona fide* purchaser, and could not, as against the parties in interest, hold on to the property.

He would, in such case, be a participator in the wrong done to the estate and those interested therein.

Before the plaintiff advanced the moneys on the faith of the Long Island Bank stock he had examined the will of the testator, by the terms of which he was advised that the two executors held the stock in trust for the widow of the testator. The stock stood in the name of the testator at the time it was transferred to the plaintiff. There is sufficient in the evidence to show satisfactorily that plaintiff was advised by Norman D. Sampson, the executor to whom he paid the money, and who alone signed the transfer of the stock, that he was in want of money, not for the affairs of the estate, but to meet his own private engagements.

The plaintiff claims to have purchased the stock, but there is something in the transaction itself which should have satisfied him that the executor was not acting honestly and for the estate he represented.

The stock was a valuable dividend-paying security. It was worth a premium of about twenty per cent. It was turned over to the plaintiff at par. He paid and advanced \$4,900 and received stock worth, and which could have been sold in the market for, a sum exceeding \$6,000.

The plaintiff, a dealer in stocks and securities, well knew how readily this stock could have been openly sold in the

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market for a sum largely in advance of what he paid and advanced.

The offer of the executor to sell the stock, and plaintiff claims it was a sale, for the sum in question was, in itself, under the circumstances, sufficient to put the plaintiff upon inquiry, and was a notice to him that the transaction was not a legitimate exercise of the power of one out of two executors.

The co-executor, who was within a few minutes' walk of the plaintiff's office, did not join in the application for the money, nor did he sign the transfer, yet no inquiry was made of him. He was kept in ignorance of the whole matter until after his associate executor, who had conducted the negotiation individually, and who received the money to his own use, had secretly absconded. The evidence shows that the transaction was not a sale of the stock, as is claimed by the plaintiff in his complaint, but was a pledge thereof to secure the sum advanced.

The non-production of the memorandum in writing, signed by the executor at the time the money was paid and the transfer signed, is not satisfactorily accounted for, and the plaintiff's evidence in respect thereto is inconsistent and contradictory.

Under the evidence I cannot think that the plaintiff was acting innocently and in good faith in dealing with and in receiving the stock in question from Norman D. Sampson, one of the executors, to the injury of the estate, and must conclude that he cannot hold the same, as security for the moneys advanced by him, not for the benefit of the estate, but for the private use of such executor.

I think it would be unjust to adjudge that the same should be transferred to plaintiff on the books of the bank.

The plaintiff knew when he made the loan that the stock was trust property, and had good reason to believe that Norman D. Sampson was misappropriating it.

The plaintiff's complaint should be dismissed, with costs.

Mann agt. Board of Education.

SUPREME COURT.

ENOCH MANN agt. THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 2, OF THE TOWN OF ONONDAGA, and AMASA L. PRATT, collector of said district, and others.

Injunction to prevent the collection of a tax.

As a general rule the supreme court will not restrain, by injunction, the assessment and collection of a tax.

The rule, however, is not universal. It is subject to three exceptions, in which cases the injunction will be granted:

First. Where the proceedings will necessarily lead to a multiplicity of actions.

Second. Where they lead to the commission of irreparable injury to the freehold.

Third. Where the claim of the adverse party is valid on its face, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved in order to establish the invalidity or illegality.

Whenever a case is made by the pleadings, falling within these exceptions, or either of them, equity will interpose.

This is especially the rule, where no legal remedy exists by which the relief sought could be obtained.

But the plaintiff, in such a case, must aver that he files his complaint not only on his own behalf, but on behalf of all others similarly situated. Such an averment is essential to a complete determination of all the rights affected by the suit.

At Chambers, July, 1877.

THE facts fully appear in the complaint, which is as follows :

The plaintiff in the above-entitled action, complaining against the defendants therein, alleges the following facts constituting his cause of action :

1. That the plaintiff is a resident and tax-payer of said union free school district, and resides within the corporate

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limits of the village of Danforth, in said district, and is over twenty-one years of age, and this complaint is made on his own behalf and on behalf of all the tax-payers of said village.

2. That at the times hereinafter mentioned, and at the present time, the defendant the said board of education was duly constituted, according to law, a body corporate, as the board of education of said union free school district, and was duly organized as such; and that the defendants George F. Hitchcock and James H. Hinman were, and still are, respectively, the president and clerk of said board, and that the defendants Matthias Britton, Alsib Childs, Hugh Scott and Samuel H. Kelley were, and still are, members of said board, and that the defendant Amasa L. Pratt was duly constituted, and still is, the collector of said union free school district.

3. That said union free school district lies south of and contiguous to the city of Syracuse, contains about two square miles of land, and comprises within its limits the incorporated village of Danforth, which lies immediately adjacent to said city on the south, and also the remaining portion of said district south of said village, known and designated as Brighton; that the said village of Danforth contains 315 acres of land, exclusive of the surface of Onondaga creek, on the west, with a population of about 800, and the balance of the territory of said district, called Brighton, contains in the neighborhood of 1,000 acres; that the school-house in said union free school district is, and for fifteen years last past has been, located at Brighton Corners, and about eighty rods south of the south boundary line of said village.

4. That prior to and in the fall and winter of 1876-7, the said school-house had become too small for the wants of said union free school district, and there arose and was a *public necessity* for a larger school-house and a new site therefor, located at some point where the whole district would be better accommodated and their growing wants the better met; that by reason of such public necessity, and in pursuance of an order from the school commissioner of the second school

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commissioner district of Onondaga county, in which school commissioner district the said union free school district is situate, the defendants the said board of education issued a call for a special school meeting, for the purpose of selecting a new site for a school-house in said union free school district; that said special meeting was held on the 5th day of February, 1877, and such action was taken thereat as resulted in choosing for a new site an acre of land lying just outside the limits of the said village of Danforth, on the south-west corner of Salina and Colvin streets, the center of Colvin street, which runs westward at right angles to Salina street, being the south boundary line of said village, and the north boundary line of the Brighton portion of said union free school district; that, pursuant to a resolution passed at said special meeting, the defendant the said board of education not being able to agree with the owner of said one acre of land upon the price or value thereof, instituted proceedings under chapter 800 of the Laws of 1866, to procure an appraisement of the same, and to acquire title thereto against the consent of the said owner, one Charles C. Jacobs.

That such proceedings were taken under said statute as resulted in an appraisal of said acre at \$2,800; and an assessment was made by said defendants the said board of education upon the taxable property in said union free school district, to raise the said sum of \$2,800, by tax, to pay for said lot, and a tax-warrant was issued by the said defendants the said board of education, and by them delivered to the defendant Amasa L. Pratt, collector of said union free school district, with directions to collect the same, and who has been, and still is, engaged in the collection of said tax for said purpose; that the amount of said tax assessed upon the taxpayers of the said village of Danforth is about \$2,000; that a part of said tax was assessed to this plaintiff, and is still unpaid by him.

5. And the plaintiff further alleges that the number of taxpayers in the said village of Danforth, as appears from the

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last assessment roll of said district, is 201, and the number in the Brighton portion of said district is 107, making a total of 308 in the entire district; and while the said proceedings to acquire title to the said one acre of land were pending, and on the 26th day of May, 1877, a petition, signed by 186 of the 201 tax-payers of the said village of Danforth, and by twenty-one of the 107 tax-payers of the Brighton portion of said union free school district, was presented to James W. Hooper, school commissioner of the second school commissioner district of Onondaga county — an officer who is thereunto authorized and empowered by law, and is decided by the state superintendent of public instruction — asking that said union free school district No. 2, of the town of Onondaga, be divided so as to make the incorporated village of Danforth a separate school district; that said school commissioner thereupon refused to act on said petition; that thereafter, and on the 29th day of May, 1877, Truman K. Fuller, one of said petitioners, duly appealed from the refusal to act of said school commissioner to the superintendent of public instruction, to whom an appeal lies by law in such case, and whose decision is made by law final and conclusive, and not subject to question or review in any place or court whatever; that subsequently, and upon issue joined upon said appeal, the said appeal was sustained and the prayer of said petition granted by the Hon. Neil Gilmour, superintendent of public instruction, and a decision was made and filed therein according to law, wherein and whereby he directed the said school commissioner, James W. Hooper, to make the proper order and take the necessary steps to divide said union free school district, so as to make the said village of Danforth a separate school district; which said order was duly made and filed by said school commissioner on the 5th day of July, 1877, to take effect, pursuant to law, on the 8th day of October, 1877, at the end of the present school year.

6. And the plaintiff further alleges, that the division of said union free school district, made as aforesaid by the state

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superintendent of public instruction, which decision is made by law final and conclusive, and non-reviewable in any place or court whatever, removes entirely the public necessity for a new school-house site in said union free school district, or for a new school-house in the Brighton portion of said district, and certainly removes all necessity or propriety of taking the said acre of Mr. Jacobs, located at the corner of South Salina and Colvin streets, on the extreme northern boundary of said Brighton district, as now existing after said division; that the present school-house at Brighton Corners is amply sufficient for the wants of the Brighton district, as made by said division, and is centrally located for the accommodation of said district; that the said village of Danforth has no school-house within its limits, and will have to select and purchase a site and build a new school building as soon as said order dividing said union free school district goes into effect; that said new site on the Jacobs' lot aforesaid is neither needed nor wanted by either district for the purpose of building a new school-house upon it — which was the purpose for which it was to be taken under the provisions of the statute before mentioned, and it can be taken for no other purpose; that all the grounds and reasons and necessity for taking said lot for public use, which existed prior to said division, were totally done away with when such division was made.

7. And the said plaintiff further alleges that, notwithstanding the said division of the said union free school district, as hereinbefore alleged, and notwithstanding there is no longer any necessity for the taking of said lot for a public use — to wit, for a new school-house site — yet, nevertheless, the said defendants the said board of education, or a majority of them — to wit, Matthias Britton, Aldis Childs, Hugh Scott and Samuel H. Kelley — refuse to abandon their said proceedings to take said lot and collect the said tax therefor, which they have a legal right, and which it is their plain duty to do, under the changed circumstances of the case,

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although thereto requested, and although the said owner is ready and offers to release them from taking the same; but, on the contrary, they are demanding of the said defendant Pratt, the said collector, that he enforce the collection of said tax by distress and sale, if necessary, against this plaintiff and other tax-payers in said village, before said order dividing said union free school district shall take effect, thereby doing great injustice to this plaintiff and others aforesaid; and the plaintiff alleges on information and belief, and charges the truth to be, that it is the unlawful and wicked design of said defendants, or the said majority of them before mentioned, to complete the collection of said tax, and pay over the moneys to said Jacobs for said lot, before the eighth day of October next, the day when said division order goes into effect, for the unjust and wicked purpose of robbing this plaintiff and other citizens and tax-payers of the said village of Danforth, most of whom, including plaintiff, have not paid said tax of the sum of about \$2,000, and giving it to the said Brighton district in the shape of a useless school-house site, whereby the grossest injustice will be done to this plaintiff and the other tax-payers mentioned.

8. And the plaintiff further alleges, and charges the truth to be, that the said defendants the said board of education, or the said majority of them, are acting in bad faith in enforcing the said tax, when there is no longer any necessity for it, by reason of the changed circumstances of the case, resulting from the said division of said union free school district aforesaid, and are wrongfully and maliciously, and against equity, seeking to impose an unjust burden upon this plaintiff and other tax-payers of said village, without just cause and through malice, by way of punishing them for desiring a school within their own village limits, which they were unable to secure without a division of said union free school district, and for the part they took in procuring such division; that the Brighton district, as constructed by said

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division, is abundantly able to maintain its own school, since it has become possessed, by said division, of a school-house and grounds ample for all its wants for many years to come, and its best citizens do not wish to be made, through such injustice, the recipients of a forced charity from their neighbors; that the defendants aforesaid unjustly refuse to call a meeting of the citizens and tax-payers of said union free school district, to consider the question of abandoning the said proceedings and tax, although they know that such is the wish of at least three-fourths of all the tax-payers in the entire district, and also wrongfully and unjustly refuse to abandon said proceedings and tax, at the request of the owner, who consents thereto and requests it, since the necessity for the taking of his private property, by process of law, and against his will, for a public use, no longer exists; that this plaintiff and the said tax-payers of said village of Danforth will get no return or equivalent for the moneys they are thus unjustly being called upon to pay for said lot, by said defendants, and it becomes, by the injustice thus sought to be practiced upon them by said defendants, a forced contribution of \$2,000 to the Brighton district, which is unjust, inevitable and wicked, and ought not to be permitted.

Wherefore the plaintiff demands the judgment and decree of this court, that the defendants be perpetually enjoined and restrained from further collection of said tax, levied and assessed by said defendants, for the purchase of said Jacobs' lot for a new school-house site in union free school district number two, in the town of Onondaga; that the said defendants be decreed, by the mandatory order of this court, to pay back that portion of said tax which has been collected to the persons who paid the same, less the fees for collection; that meanwhile, and during the pendency of this action, a temporary injunction be granted commanding the defendants, and each and every of them, to absolutely desist and refrain from further collection, or attempting to collect, any and all taxes levied or assessed by the board of education

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of union free school district number two, of the town of Onondaga, for the purchase of a lot for a new school-house site in said union free school district number two, of the town of Onondaga, and from collecting, or attempting to collect, the tax mentioned and described in this complaint, and from enforcing, or attempting to enforce, the same in any way whatever, and for such other judgment order or decree in the premises as may be just and equitable, besides costs.

Fuller & Vann, attorneys for plaintiff.

Pratt, Brown & Garfield, attorneys for defendants.

NOXON, J. — Upon the complaint in this action, and the affidavit of T. K. Fuller, annexed, a temporary injunction was granted *ex parte* on the 9th July, 1877, restraining the defendants from collecting any and all taxes levied or assessed by the board of education of union free school district No. 2, of the town of Onondaga, for the purchase of a lot for a new school-house site in said district. On the twelfth July, on the application of defendant, and on the complaint in the action and the affidavit of Matthias Brittain, and upon the proceedings taken by the said board of education for acquiring title to said site for a school-house, and the proceedings upon appeal from said board to the superintendent of public instruction, this decision, upon the appeal and upon the letter of T. K. Fuller to Jacobs, of May 9th, 1877, and all other proceedings had for obtaining title to said site, filed in Onondaga county clerk's office, an order was granted that the plaintiff show cause before the undersigned, at his chambers, on July fourteenth, at nine A. M., why the injunction order granted by him in this action should not be dissolved. The motion to dissolve the injunction order was adjourned until the sixteenth day of July, at which time the parties appeared by counsel, and the motion to dissolve said injunction was heard. The

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principal question raised on the part of the defendants and argued upon the motion, related to the equity power of the court to grant an injunction preventing the assessment or collection of a tax. The claim was made on the part of the defendant, that the rule was settled that the court will not enjoin the collection of a tax on behalf of a taxpayer, and numerous cases are cited to sustain the rule. Among others, 59 *New York*, 21; 18 *id.*, 155; 23 *id.*, 318; 50 *Barbour*, 190.

From a careful examination of these cases, and also authorities cited by plaintiff's counsel, I am satisfied that, as a general rule, the court will not and do not grant the order to prevent the assessment or collection of a tax. But it is quite clear, from the cases, that the rule is not universal. The rule is quite general that equity will not interfere to restrain the collection of a tax which is claimed to be illegal or void; in such cases the party is almost universally left to his remedy at law. But even in such a case it was held, in *Wood agt. Draper* (24 *Barb.*, 187), that a tax contrary to law, or levied without authority of law, might be enjoined, although in that case the relief was denied because the plaintiff had not averred in his complaint that it was filed on behalf of all others similarly situated, and that such averment was necessary to a complete determination of the rights of the parties. In the case of *Hayward agt. The City of Buffalo* (14 *N. Y.*, 534), cited by defendant's counsel, the general rule is laid down as claimed. But in this case the court held that the general rule is subjected to three exceptions, in which cases the injunction will be granted: First. Where the proceedings will necessarily lead to a multiplicity of actions. Second. Where they lead to the commission of irreparable injury to the freehold. Third. Where the claim of the adverse party is valid on its face, or the proceedings sought to be set aside, and the extrinsic facts are necessary to be proved in order to establish the invalidity or illegality. And the court say, whenever a case is made by the pleadings falling within these exceptions, or either of them, equity will interpose. The court say, in that case, that

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the plaintiff was bound to make out a case falling under some acknowledged head of equity jurisdiction; and DENIO, J., states (*p.* 545), that no case was made out because the amount of the illegal tax was not stated. In a note to *High on Injunctions* (*p.* 195), it is stated that the three exceptions, in 14 *New York*, 534, do not comprehend all the exceptions. The same rule, as to exceptions, is laid down in 57 *Barbour*, 383, in case of *Hanlon agt. Supervisors of Westchester*. The doctrine was laid down in 40 *New York*, 191, that the injunction should be granted for "the inadequacy of a legal remedy to secure the party in the enjoyment of his rights." In *Dorn agt. Fox* (61 *N. Y.*, 264), a tax collector was restrained by injunction. In 63 *New York*, 582 (*Campbell agt. Leaman*), the rule is laid down (EARL, J., *p.* 582), the writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits.

In 14 *Wisconsin*, 618 (*Warden agt. Supervisors of Fond du Lac County*), the court state, on page 620: "The primary and controlling principle in such cases is, that the proceedings to be stayed are inequitable and unjust, and that it will be against conscience to allow them to go on."

In 25 *New York*, 314, judge DENIO says: "A bill to restrain the collection of a tax will not lie, unless the case is brought within some acknowledged head of equity jurisprudence."

The authorities cited are sufficient to lead us to the conviction that although, as a general rule, the collection of a tax will not be restrained, the rule has its exceptions, and the question presented in this case is: Does this case pass within the exception?

The action is brought by plaintiff for himself and in behalf of the other tax-payers of the village of Danforth to be relieved from the payment of a tax imposed upon them to pay for the site of a school-house taken by the district of which Danforth constituted the north portion and Brighton the south portion of the district. That the site selected was just south of Danforth and in Brighton, and when selected

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a public necessity existed for the same. That such proceedings were regularly taken, and the board of education had issued a warrant for the collection of a tax of \$2,800, \$2,000 of which was assessed on tax-payers of Danforth. That since then proceedings were taken to obtain the site. The district had been divided so that Danforth is a separate district and Brighton constitutes district No. 2. That defendants are proceeding with the tax, and when collected will pay the purchase-price of the lot and obtain title, and by reason thereof the tax-payers of Danforth will lose the old site and school-house in Brighton, and also all claim in the new site. The plaintiff claims that the proceeding to collect the tax against them and other tax-payers of Danforth, although legal, are inequitable and unjust and against good conscience and should be restrained.

The complaint itself need not be contained in the decision. The plaintiff prays for a perpetual injunction and for a temporary injunction during the pendency of the action. It is not for me to express any opinion upon the result of the case. It is sufficient for me to hold that I am of the opinion that this case comes within the exceptional class of cases. I can see no legal remedy existing by which the plaintiffs can obtain relief. The defendants are regularly proceeding according to law to enforce the tax. The only question is whether this case is brought within some acknowledged head of equity jurisdiction. From the facts stated in the complaint and the authorities referred to, I believe it is, although I find no case in the books, fully sustaining the conclusion I have reached. If I am wrong in the view I have taken of the case, it is a satisfaction to know that by allowing the injunction to stand, no injury can result to the defendants. If plaintiff cannot succeed, the taxes are only tied up by injunction to be renewed again and collected at the termination of the suit. The motion is denied. The case being wholly new, no costs allowed.

Attorney-General agt. Atlantic Mutual Life Insurance Co.

SUPREME COURT.

In the matter of the application of the ATTORNEY-GENERAL
agt. THE ATLANTIC MUTUAL LIFE INSURANCE COMPANY.

Life insurance company — Receiver — Laws of 1869, chapter 902.

Where it appears to the satisfaction of the court that the assets and funds of a life insurance company are not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations, the act (*Laws of 1869, chapter 902*) is imperative as to the duty of the court to enjoin the company from the further prosecution of its business, and to appoint a receiver of all the assets and credits of the company.

Ulster Special Term, July, 1877.

APPLICATION by the attorney-general for a receiver, pursuant to chapter 902 of Laws of 1869.

Rosendale & Sweeny, for attorney-general.

Smith & Barnes, for company.

George L. Steadman, for policyholders.

WESTBROOK, J. — When the evidence taken upon this examination was closed at Albany, on the twenty-fourth day of May last, it was conceded that whilst the above-named company was solvent as to its creditors and policyholders, the capital was so far impaired that it was not wise or prudent for it to continue business unless an additional sum of \$50,000 was added thereto.

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To enable the stockholders to pay in this sum, the proceeding was adjourned to the last Tuesday of June last. The following is a part of the conversation which then occurred between the president of the company and the court, as evidenced by the notes of the stenographer, and which took place after the suggestion by the court that the above-named sum should be added to its capital:

The COURT—“Do you say, Mr. Pruyn, that you have no doubt that this arrangement will be completed?”

Mr. PRUYN—“Not the least, your honor, because I saw the largest number of stockholders, and they are prepared to do it, and will do it.”

The proceeding was then adjourned to the last Tuesday of June, 1877, and has been further adjourned to this day. No part of the capital has been made up, and the court is satisfied that the stockholders desire not to continue the business, but to wind up the affairs of the corporation. To enable them to do so, the court is asked to enjoin the issuing of new policies, and to allow the officers of the company to close and settle its estate.

It is due to such officers to state that there is no distrust felt by the court in their integrity, and that the application is denied principally for want of power. Section 7 of chapter 902 of the Laws of 1869 expressly declares, “in case it shall appear to the satisfaction of the said court that the assets and funds of said company are not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations, as authorized by its charter, then the said court shall issue an order enjoining and restraining said company from the further prosecution of its business, and shall also appoint a receiver of all the assets and credits of said company.”

The inability of the company safely to incur “new obligations” is admitted by the application, and such concession makes it imperative for the court to act.

The uncertain condition of the company would also jeopard-

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dize the interests of policyholders, who would doubtless allow policies to lapse, and then the shareholders would be benefited at the expense of those who are first to be protected.

The court entertains no doubt of the good faith of Mr. Pruyn in his promise and assurance that the capital could be promptly made up. The conversation is not repeated to reflect upon him, but solely to justify the court in its present action, which is reluctantly taken, after affording the company every opportunity to avoid such a result.

The attorney-general will prepare the necessary order, and suggestions as to the receiver will be received prior to Friday next.

Brown agt. Curran.

SUPREME COURT.

BROWN agt. CURRAN.

Landlord and tenant — Pleading — Counter-claim to action for rent.

To an action for rent the defendant set up, by way of counter-claim, damages arising from the erection of buildings on an adjoining lot, the intention of the adjoining owner to build being, as alleged, fraudulently concealed at the time the relation of landlord and tenant was created.

Held, on demurrer, that the counter-claim was insufficient. Building is not necessarily injurious to adjoining occupant.

Special Term, October, 1875.

VAN VORST, J. — The counter-claim does not distinctly aver that the plaintiff knew, at the time the lease was made, that the owner of the adjoining premises intended to build. If he did not actually know such fact, it can with no propriety be said that he concealed it.

I do not regard the general statement that plaintiff fraudulently concealed the intention of the adjoining owner to build as a distinct and clear averment that he had the knowledge of such intention. It may imply knowledge. But an implication or inference should not be accepted in the place of facts, which should be distinctly averred.

But aside from this, I do not think that the matters set up constitute a counter-claim to the plaintiff's demand for rent, which is admitted to be unpaid.

Building is not necessarily a nuisance or a cause of damage to an adjoining owner. And tenants themselves should take notice and be prepared for such contingencies of constant occurrence, and make their arrangements accordingly.

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Building may be attended with inconvenience to adjoining owners, but that in itself gives no cause of damage or ground of action. Even if the plaintiff knew that the adjoining owner intended to build, he had good reason to presume that he would do so in a proper manner, and not in a way to cause a nuisance.

There should be judgment for the plaintiff on the demurrer.

Stallknecht agt. Pennsylvania Railroad Company.

SUPREME COURT.

ANN STALLKNECHT, as administratrix, agt. THE PENNSYLVANIA
RAILROAD COMPANY.*Negligence — Complaint — Demurrer.*

The rule seems to be that causes of action for damages, such as are given by our statutes (*Laws of 1847 and 1849*) to the personal representative of a deceased person, whose death was caused by culpable negligence, are not recognized by the common law, and that statutes of any particular state giving such rights of action have no extra territorial jurisdiction.

But causes of action of this character, arising under statutes of one state, may be enforced in another state, provided it is made to appear that the maintenance of such causes of action is in conformity with the policy of the state in which the action is brought, and are recognized by the laws of that state.

Where the complaint sets forth the following facts, viz.: That defendant is a corporation of the state of Pennsylvania, and the owner of the Pennsylvania railroad, &c.; that plaintiff's intestate was in the employment of defendants, as brakeman on a freight train, at the time of the accident which caused his death; that the death was caused by negligence, &c., of defendants, and without any fault of plaintiff's intestate; that the collision occurred in the state of New Jersey; then sets out a statute of the state of New Jersey, and alleges that it was part of the law of New Jersey, at the time of the occurrence of the grievances complained of by plaintiff, and under which plaintiff claims the right to recover in this action; that plaintiff was duly appointed administratrix, &c., and that her intestate left surviving the plaintiff, his widow, and three minor children, who were dependent upon him for support, and sustained pecuniary injury by his death to plaintiff's damage, naming the amount:

Held, on demurrer to the complaint, that it appears, from the allegations in the complaint, that the act of New Jersey is in entire consonance with the policy of the state of New York, as declared by its acts of 1847 and 1849, and that the complaint stated facts sufficient to constitute a cause of action.

Special Term, May, 1877.

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Stallknecht agt. Pennsylvania Railroad Company.

THE complaint in this action alleged as follows :

First. That the defendant is a corporation of the state of Pennsylvania, and owner of the Pennsylvania railroad, with its tracks, cars, locomotives and other appurtenances.

Second. That on or about the 6th day of April, 1875, one Charles Stallknecht was in defendant's employment as brakeman on a freight train, the property of defendant, which was propelled by steam on the defendant's railroad.

Third. That by the negligence or unskillful conduct of the defendant, its servants or agents, in the management of said train, and by defendant's default in not keeping its track in proper condition and clear of obstacles, and without fault on the part of the said Charles Stallknecht, "the said train of cars, while proceeding from Jersey City to Millstone, both in the county of Hudson and state of New Jersey, came into collision with another train of cars of the defendant's, on its said railroad, and the said Charles Stallknecht was thereby killed."

The complaint then sets out a statute of the state of New Jersey, passed March 3, 1848, which, it is alleged, was part of the law of the state of New Jersey at the time of the occurrence of the grievances complained of by the plaintiff, and under which the plaintiff claims the right to recover in this action.

The said statute is as follows :

"An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default.

"1. Be it enacted by the senate and general assembly of the state of New Jersey, that whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured,

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and although the death shall have been caused under such circumstances as amount in law to a felony.

"2. And be it enacted, that every such action shall be brought by and in the names of the personal representatives of such deceased person ; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate ; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person ; *provided*, that every such action shall be commenced within twelve calendar months after the death of such deceased person.

"3. And be it enacted, that on the request by the defendant, or the defendant's attorney, the plaintiff on the record shall be required to deliver to the defendant, or to the defendant's attorney, a particular account in writing of the nature of the claim in respect to which damages shall be sought to be recovered.

"4. And be it enacted, that this act shall take effect immediately.

"Approved March 3, 1848."

The complaint then alleges that the said Charles Stallknecht died intestate, and on the 23d day of September, 1875, letters of administration on his estate, dated on that day, were issued and granted to the plaintiff by the surrogate of the county of New York, and plaintiff thereupon qualified and entered upon the duties of her office as administratrix.

The complaint then alleges that Charles Stallknecht left surviving the plaintiff, his widow, and three minor children, who were dependent upon him for support, nurture and education, and sustained pecuniary injury by his death to plaintiff's damage in the sum of \$30,000, for which she demands judgment, with costs.

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The defendants have demurred to this complaint upon the ground that the same does not state facts sufficient to constitute a cause of action.

Messrs. Robinson & Scribner, for the demurrer.

Mr. William O. Bartlett, in opposition.

VAN BRUNT, J.—The only difficulty which I have in the disposition of this case is the opinion of Mr. justice SHIPMAN in a case of exactly parallel character, in which he has decided that an action of this nature cannot be maintained. An examination of his opinion will show that his conclusion was founded upon the cases of *Whitford agt. Panama Railroad Company* (23 N. Y., 465); *Richard agt. New York Central Railroad Company* (98 Mass., 85); and *Woodard agt. Michigan Southern and Northern Indiana Railroad Company* (10 Ohio State, 121). The question in the case of *Whitford agt. Panama Railroad Company*, was whether an action could be maintained in the courts of this state for damages resulting from a death caused by the culpable negligence of the defendants while operating their railroad in New Grenada. The plaintiff in that case sought to recover solely by virtue of the "acts" of the state of New York, passed in 1847 and 1849, and the court decided that those acts did not apply where the injury was not committed in this state, but in a foreign country. No cause of action, such as was given by the act in question, was known to the common law, and neither was any given by the laws of New Grenada. The court, in that case, however, says that, "whatever liability the defendants incurred by the laws of New Grenada might well be enforced in the courts of this state. The defendant is a domestic corporation, being readily compellable to answer here. But the rule of decision would still be the law of New Grenada, which the court and jury must be made acquainted with by the proof exhibited before them." In another place the court clearly say, that if a statute similar to ours had

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existed in New Grenada the action could have been maintained.

It is true that these suggestions, made in the opinion of the learned justice, who wrote the opinion in the court of appeals, in the case of *Whitford agt. Panama Railroad Company (supra)*, were not necessary to the decision of that case, yet I think they throw considerable light upon the theory upon which all these cases are decided.

The case of *Richardson agt. New York Central Railroad Company*, decides that an administrator appointed in Massachusetts cannot maintain an action in that state on the statute of another state which gives to the personal representative of a person killed by the wrongful act, &c., a right to maintain an action for damages in respect thereof.

An examination of that case will show that the decision was based upon the ground that the statute of New York gives a new and peculiar system of remedy by which rights of action are transferred from one person to another in a mode which the common law does not recognize and which is not in conformity with laws or practice of Massachusetts.

The court use this language: "The only construction which the statute can receive is, that it confers certain new and peculiar powers upon the personal representatives in New York. The administrator in Massachusetts is in privity with the New York administrator only to the extent which our laws recognized. A succession in the right of action not existing by the common law, cannot be prescribed by the laws of one state to the tribunals of another. It is upon this principle that the negotiability of contracts, and whether an assignee can maintain an action in his own name, is held to be determined by the *lex fori*, and not by the *lex loci contractus*; a matter not of right but of remedy."

It seems to me that the reasoning of this case clearly indicates that if the law of Massachusetts had given the same succession in the right of action to the personal representatives for damages resulting from the death of a person killed

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by wrongful act, &c., as was given by the state of New York, a different decision would have been arrived at, because the decision which was rendered was based upon the ground that an administrator could not enforce a remedy in the courts of Massachusetts, which the common law did not recognize, and which was in conflict to the law and practice of that state.

The case in Ohio was decided upon precisely similar grounds.

It appears from the allegations in the complaint in this action, that the act of New Jersey is in entire consonance with the policy of the state of New York, as declared by its acts of 1847 and 1849. Such being the case, none of the reasoning of the Massachusetts and Ohio cases can apply to the case at bar, but, upon the contrary, they expressly sustain the reasoning of judge DENIO, in the case above mentioned.

The rule, therefore, to be deduced from the cases above cited, seems to be this, that causes of action of the kind set forth in the complaint in this action, are not recognized by the common law, and that statutes of any particular state giving such rights of action, have no extra territorial jurisdiction; that causes of action of this character arising under statutes of one state, may be enforced in another state, provided it is made to appear that the maintenance of such causes of action is in conformity with the policy of the state in which the action is brought and are recognized by the laws of that state.

It follows, therefore, that the demurrer must be overruled, the defendants to have leave to answer upon payment of costs.

Musgrave agt. Sherwood.

SUPREME COURT

FANNIE E. MUSGRAVE agt. JOHN H. SHERWOOD.

Injunction — Enlargement and alteration of building — Party wall — Tenement-house.

On December 15, 1873, the defendant, being the owner of four first-class dwelling-houses and lots on Fifth avenue, immediately north of Forty-fourth street, in the city of New York, conveyed, by warranty-deed, to plaintiff, the third dwelling and lot north of Forty-fourth street. The lot thus conveyed was thirty feet in width on Fifth avenue and one hundred feet in depth, and the dwelling thereon was thirty feet wide and sixty feet deep. The southerly line of the plaintiff was the center of a party wall between the buildings of plaintiff and defendant. All four of the dwellings were first-class private residences, and plaintiff was assured by defendant that they would so remain, which assurance was one of the inducements which influenced the purchase. The title under which the defendant holds his property forbids the erection thereon of "a tenement-house." In 1875 defendant remodeled the interior of his two dwellings immediately south of that belonging to plaintiff, and converted them into an establishment known as a French flat or an apartment-house. He also extended his building in the rear to the depth of his lot and erected his wall, which was an extension of the old party wall, several inches upon the property of the plaintiff. He now proposes to erect two additional stories upon his two dwellings, in which erection, by adding to the height of the party wall, he really occupies and builds upon the land of plaintiff, removing the chimneys of her dwelling and otherwise interfering with her property.

Held, that the completion of the buildings as dwellings, the erection of the party wall between them in a finished state, and the positive declarations of defendant made to plaintiff at the time of the purchase, all show that the party wall, as it existed at the time of the conveyance to the plaintiff, was to be the completed wall between the two buildings. As there is nothing from which any agreement or right to add to the party wall can be inferred, and as all acts and promises point to an opposite one, the injunction asked for must be granted

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Held, also, that the conversion and change by defendant of his two houses into French flat or apartment-house is a violation of his covenant not to erect a tenement-house. A building which is to be occupied by tenants, in name and in fact, is clearly within the true meaning and definition of a *tenement-house*.

The case of *Brooks* agt. *Curtis* (50 N. Y., 639) distinguished.

At Chambers, July, 1877.

APPLICATION by plaintiff for an injunction restraining the defendant in the enlargement and alteration of certain buildings in the city of New York which adjoin the dwelling of the plaintiff.

William A. Beach, for plaintiff.

H. B. Turner, for defendant.

WESTBROOK, J.—This application involves questions of so much importance as to cause us to regret that owing to the pressure of business and the need of a speedy decision, no elaborate discussion thereof can be attempted. A very hasty outline of the reasons which compel us to grant the temporary relief asked by the plaintiff can only be given.

Prior to December 15, 1873, the defendant was the owner of four first-class dwelling-houses and lots, situate on the easterly side of Fifth avenue, in the city of New York, immediately north of Forty-fourth street. On that day he conveyed, by warranty deed, to the plaintiff the third dwelling and lot north of Forty-fourth street aforesaid. The lot thus conveyed was thirty feet in width on Fifth avenue and 100 feet in depth, and the dwelling thereon was thirty feet wide and sixty feet deep. The southerly line of the plaintiff was the center of a party wall between the buildings of the plaintiff and the defendant. At the time of the sale to and purchase by the plaintiff, all four of the dwellings were first-class private residences, and the plaintiff was assured by the defendant that they would so remain and continue, which

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assurance was one of the inducements which influenced the purchase. It is true that the defendant denies that any such statements were made, but the positive evidence of the plaintiff and her husband induce us to believe that the defendant, in such denial, is mistaken.

In the year 1875, the defendant remodeled the interior of his two dwellings immediately south of that belonging to the plaintiff, and converted the same into an establishment known as a French flat or an apartment-house. To this alteration the plaintiff objected, though the exterior of the buildings was not changed. He also, at the same time, extended his building in the rear to the depth of his lot, and erected his wall, which was an extension of the old party wall, several inches upon the property of the plaintiff. He now proposes to erect two additional stories upon his two dwellings, in which erection, by adding to the height of the party wall, the defendant really occupies and builds upon the land of the plaintiff, and in so doing removes the chimneys of her dwelling and otherwise interferes with the property of the plaintiff, and these acts she seeks to enjoin and prevent.

As the defendant is about to use and occupy a part of the plaintiff's premises in his erection, it is evident that such occupation is unlawful, and must be restrained, unless his rights growing out of the party wall between the two buildings enable him so to do. *Brooks agt. Curtis* (50 *N. Y.*, 639) is the authority relied upon by defendant to justify his contemplated action. A careful reading of that case, however, will show that upon the circumstances attending the construction of the party wall the court based its decision, holding that it had not been permanently established, but that, on the contrary, it had been erected under such circumstances as to imply the right of further and other additions and use. When the plaintiff in that case took his deed the store upon his lot was unfinished and the lot of the defendant was not built upon. From these facts the learned judge (RAPALLO) might well say, as he did say (*page* 642): "We think that

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the language of the deed and the acts of the parties show that it was their intention that the wall should be a party wall for the common use of both lots;" and hence it follows that, as the use was undefined and unlimited by any act or declaration of either party, its use in any particular way was not unlawful.

Not so, however, in this case. The completion of the buildings as dwellings, the erection of the party wall between them in a finished state, and the positive declarations of the defendant made to the plaintiff at the time of the purchase, all show that the party wall, as it existed at the time of the conveyance to the plaintiff, was to be the completed wall between the two dwellings. As there is nothing from which any agreement or right to add to the party wall can be inferred, and as all acts and promises point to an opposite one, the contemplated use of plaintiff's premises by defendant must be enjoined for this reason.

This application also involves another question. It was conceded on the argument that the title under which the defendant holds his property forbids the erection thereon of "a tenement-house," and thus the point is presented whether or not the conversion and change by him of his two houses into a French flat or apartment-house, is a violation of this covenant. The point is not free from difficulty, but reflection has satisfied me that the proposed erection is within both the spirit and the letter of the expression. The obvious object of such a provision was to free the premises from the confusion and disquiet which must surround any building which is the abode of several distinct families. That the grantor intended to dedicate and preserve the property to and for the use of first-class private dwelling-houses is clear; and while it is conceded that the annoyance and discomfort arising from the occupation of defendant's structures for the purposes designed would be somewhat less than if they were to be the abodes of the poorer classes, it is still manifest that the distinction is in degree and not in kind. The bustle, con-

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fusion and want of privacy which the grantor intended to guard against, would necessarily be present, and to that extent, at least, his intention would be defeated.

It was strenuously urged by the defendant that the expression, "tenement-house," must be confined in meaning to the abodes of poor families who, as tenants, occupy a single building. One difficulty attending this definition is, that there is no fixed standard by which poverty and wealth can be measured. How many dollars must an individual have to be entitled to be called rich, and how few must he possess to be regarded as poor? Will the name of the building change as its occupants change? Manifestly, it seems to me, not. Some other definition than one which shifts and changes with the families occupying it must be sought for. The word "tenement," according to Bouvier (*Bouvier's Law Dictionary*, vol. 2, p. 583), in its larger sense, "comprehends every thing which may be holden, provided it be of a permanent nature." According to the same author it also signifies a "house or homestead," and as defined by Jacobs in his law dictionary, which Bouvier quotes, "rooms let in a house." The compound word "tenement-house" must, therefore, signify and mean a house with distinct tenements or homes, which separate and different families or persons occupy as tenants. Not merely a boarding-house or hotel, for in these the occupancy is not one of tenancy, but that of guests or boarders.

It was conceded upon the argument that, whilst a common table and laundry is to be provided in the structure of the defendant, for the accommodation of its occupants, if they wish to use them, yet that the various copartments are let and rented to them, they paying a sum in money as the rent thereof. No reason occurs to me why, literally and truly, the building of the defendant, which is to be occupied by tenants, in name and in fact, is not clearly within the true meaning and definition of a "tenement-house." The injunction asked for must also for this reason be granted.

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The court is not insensible to the damage which the granting of this provisional remedy will do to the defendant, provided it be held in the end that the injunction should have been refused. The right to the temporary relief depends upon no disputed fact, and, in my judgment, such right is not doubtful. The Code (*section 219*) requires its issue "when it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff." Within this provision the plaintiff, it seems to me, has fairly shown herself to be, and her prayer for relief must be granted.

The remedy sought is the more readily approved because the important questions which this case involves should be settled before the building is completed. It is better for the defendant to stop now, if he is in the wrong, than to expend a large sum of money, which will be entirely wasted if the building must, in the end, be restored to its original condition.

The plaintiff must, however, give such security as will be sufficient reasonably to indemnify the defendant, if it be determined that the injunction improvidently issued. The relief asked for will be granted upon an undertaking, with sufficient sureties, in the sum of \$15,000.

Scamoni agt. Ruck *et al.*

SUPREME COURT.

SCAMONI agt. RUCK *et al.*

Mortgage—assignment thereof subject to the equities of the mortgagor—Bona fide purchaser, who is not.

An agreement was made between R. and S. that S. should pay a mortgage made by C., in consideration whereof R. agreed to cancel a mortgage he held, made by S.

Held, that this agreement bound the assignee of the S. mortgage, who took the same from R. with knowledge thereof, as also the Broadway Bank, who afterwards received the mortgage from such assignee, as security for a debt, and that S., having paid the mortgage of C., was entitled to a satisfaction of his own mortgage in the hands of the bank. *Ingraham agt. Disborough* (47 N. Y., 421), *Cutts agt. Guild* (57 *id.*, 282) applied.

Special Term, April, 1876.

J. R. Nelson, for plaintiff.

W. H. Field, for defendant.

VAN VORST, J. — The evidence satisfactorily establishes an agreement between Ruck and Scamoni, that Scamoni should pay the principal and interest of the Corbett mortgage, and that when paid by him, Ruck should cancel and surrender the Scamoni mortgage. This agreement and understanding was communicated to Smith at the time of the delivery to him of the Scamoni mortgage.

Smith took the assignment of this mortgage, subject to the agreement between Ruck and Scamoni. The evidence shows that he fully comprehended that upon the satisfaction by Scamoni of the Corbett mortgage, he would be entitled to a

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return or satisfaction of his mortgage. Scamoni having paid the Corbett mortgage, is entitled to a satisfaction of his own mortgage.

The defendant, the Broadway Bank, not being a *bona fide* purchaser for value, can assert no right or claim to the Scamoni mortgage, greater than that which its assignee, Smith, possessed. It was taken by the bank, subject to all the equities existing between Ruck and Scamoni, of which Smith had notice. The bank, in fact, parted with no value when it took the mortgage. It was received simply as further security for Smith's previous indebtedness. That does not constitute the bank a holder for value. It gave up nothing, and added nothing to the claim in its favor against Smith.

It did undoubtedly give Smith time to pay his debt, and forbearance for a definite time is regarded as consideration of value. But I apprehend that such forbearance in this instance cannot defeat the prior equity in plaintiff's favor to have this mortgage satisfied upon the payment of the Corbett mortgage.

The claim of the bank against Smith had already been placed in the hands of its attorney for collection, and had proceeded to judgment without avail. There is nothing in the case which shows that the bank lost any thing by such forbearance, or had been at all prejudiced. The collateral security it then held had proved valueless.

In order to defeat the equity existing in plaintiff's favor, the bank must have parted with money or some value on the strength of this security. The giving of time to Smith in his *then condition* was no parting with value.

But conceding that the bank is a *bona fide* holder, it would seem, upon authority, that the mortgage was taken subject to the equities existing between the original parties (*Ingraham agt. Disborough*, 47 N. Y., 421; *Cutts agt. Guild*, 57 *id.*, 232).

There should be judgment for the plaintiff, directing the satisfaction of this mortgage.

Wheaton agt. Voorhis *et al.*

SUPREME COURT.

ABEL WHEATON agt. JACOB VOORHIS, Jr., *et al.**Mortgage foreclosure — Defense usury — Answer — Evidence — Variance.*

The acceptance by the lender from the broker of any portion of his commissions does not constitute usury.

The representations of the agent of the lender do not bind the principal unless authorized by him, or the fruits of such representations are received by the lender with knowledge of their origin.

The question in such case would seem to be, did the lender receive the money from the broker for the purpose of evading the usury law, or for the purpose of receiving more than seven per cent for the loan of his money.

Usury must be strictly proven as alleged, and any variance is fatal.

Where the allegations in the answer are, that the plaintiff took \$3,900 in excess of legal interest for the loan or forbearance of the mortgage debt, while the evidence shows that the total amount received by the plaintiff was \$2,125: *Held*, to be a variance which is fatal.

A motion at the close of the case to conform the pleadings to the proof can never be granted where the admission of the evidence has been promptly objected to upon the ground that the evidence did not tend to support the allegations in the answer.

Special Term, May, 1877.

In January 1873, one George W. Willet was the cashier of the Bull's Head Bank, of which bank the defendant Voorhis was a director, and of which both Wheaton and Voorhis were depositors. At or about the above date, the plaintiff having \$50,000 which he desired to invest, asked the said Willet if he could not find among his customers some one who desired to borrow this money, and could give good security therefor: Willet replied that he would make inquiry

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among his customers, and in a day or two offered as security for the loans, a piece of property on the Eighth avenue which was examined by the plaintiff and refused. The said Willet shortly after told the plaintiff that he had a lager beer brewery to offer as security, and at the same time told the plaintiff that if he would allow him, Willet, to place his money that he would divide what commissions he should receive. The plaintiff thereupon examined the lager beer brewery, and rejected it as security for the loan. The said Willet then asked the defendant Voorhis if he did not desire to borrow \$50,000, and if he could not give good security therefor. The said Voorhis said that he did, and offered as security the premises mentioned in the complaint. Willet asked what bonus or commission he was willing to pay for such a loan? Voorhis replied, eight per cent. Willet thereupon submitted an application for the loans to Voorhis, upon the property mentioned in the complaint to the plaintiff, who after having had the premises appraised, notified Willet that he accepted the security for the loan, and also notified him that the title would be examined by Messrs. Norwood and Coggeshall, who would want any papers Mr. Voorhis had relating to the title. Mr. Willet then informed Mr. Wheaton that he had to pay all the expenses for the examination of the title, and subsequently furnished Mr. Wheaton with an order signed by Mr. Voorhis upon his attorney for the title papers, which order Mr. Wheaton handed over to his attorneys Norwood and Coggeshall. At Mr. Coggeshall's request, Mr. Wheaton asked Mr. Willet to go down to their office, to make arrangements about the searching of the title which he, Willet, was to pay. Upon their way down town to the lawyer's office Mr. Willet told Mr. Wheaton that he was going to pay him \$2,000 out of his (Willet's) commission in this transaction. This was the first conversation that Willet and Wheaton had in respect to division of commissions since the rejection of the lager beer brewery proposal. Mr. Willet, upon arrival at the attorney's office, made an agreement with them that they would search the title for \$600. Upon exam-

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ination, the title having proved more difficult than was supposed, the attorneys demanded \$250 more, which Mr. Voorhis agreed to pay. The title having been examined and found satisfactory, the parties were to meet upon the 5th of February, 1873, at the office of Mr. Wheaton's attorneys, for the purpose of concluding the loan. At Mr. Willet's request, Mr. Voorhis drew a check to the order of Mr. Willet for \$850; also a check to his own order for \$500, and another for \$2,900. Having indorsed the two last named checks in blank, Voorhis delivered the three to Mr. Willet, who thereupon drew the money upon the \$2,900 check. Then Mr. Voorhis and Mr. Willet went to the plaintiff's attorneys' office and there met the plaintiff, and the transaction was completed, Mr. Wheaton paying Mr. Voorhis \$50,000 and taking the bond and mortgage in suit. Mr. Willet indorsed and transferred the \$850 check to the plaintiff's attorneys, and the parties left. Subsequently, on the same day, at Mr. Willet's bank, Mr. Willet paid to Mr. Wheaton \$2,125, telling him for the first time of Mr. Voorhis payment of the \$250 extra.

This action is brought to foreclose said mortgage, and the defense is usury.

Clioate, and Norwood & Coggeshall, for plaintiff.

Porter & Beach, for defendants, argued the following points:

'The proofs in this case on the part of the defendants substantially establish the fact that plaintiff retained the witness George W. Willet to procure an investment for the sum of \$50,000 upon bond and mortgage, to be approved by plaintiff.

Whatever bonus, advantage or commission should be derived by the investment from the borrower was to be divided between the plaintiff and his agent Willet. Willet so testifies, and plaintiff states that Mr. Willet announced his willingness thus to share any bonus or profit, and plaintiff at the time

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was silent (as he states), but permitted the negotiation to proceed to consummation, and the bond and mortgage in question was thus brought into existence.

When the loan was closed, and as a part of the transaction, plaintiff received from defendant Voorhis, through the hands of his own agent, Mr. Willet, the sum of \$2,125 in cash.

If there was no actual contract or arrangement with plaintiff as to usurious interest before this time, there certainly was a proposition matured into acceptance on the receipt of this sum of \$2,125.

It is not necessary to prove an actual agreement *in language* for the payment and receipt of usurious interest, in order to substantiate and establish usury (*Powell agt. Waters*, 8 *Cow.*, 696; *Fielder agt. Darrin et al.*, 50 *N. Y.*, 437; *Birdsell agt. Patterson*, 51 *id.*, 43; *Alger agt. Gardiner*, 54 *id.*, 360).

It is certainly observable, to a marked degree, that the *three checks* drawn by defendant Voorhis to pay the bonus under his agreement with plaintiff, made through his agent, Mr. Willet, should be drawn, *under Willet's direction*, one for \$850, for the lawyers; the second for \$500, to pay Willet's commission; while the other check is drawn for the sum of \$2,900, the amount Mr. Willet had told defendant Voorhis was to be paid over to plaintiff.

Mr. Willet does not deny that he gave directions to have the checks thus drawn, nor does Mr. Willet *positively* deny that he told defendant Voorhis that the bonus money was to be divided as above indicated.

Mr. Willet simply says that he *thinks* he did not so state.

This want of positive recollection cannot certainly overcome the affirmative recollection of defendant Voorhis, particularly when the checks are produced, drawn by direction of Mr. Willet, specifying the different amounts, as defendant Voorhis states, they were to be applied or assigned to the different parties.

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VAN BRUNT, J. — It may be said that in the foregoing statement of the case, that the testimony of Mr. Voorhis has not been duly considered, but I am of the opinion that Mr. Voorhis' recollection as to what Mr. Willet told him about the disposition to be made of the eight per cent commission is based entirely upon the amounts of the checks drawn by him and given to Willet. There is nothing in this case which leads to the conclusion that Mr. Willet made any false statements to Mr. Voorhis in regard to this loan, which must have been the fact if Mr. Voorhis' evidence is correct, and it is very easy to conceive by what process of reasoning Mr. Voorhis would come to the conclusion, upon an inspection of his three checks, that Mr. Willet had told him that the \$2,900 was to be paid to Mr. Wheaton. It seems to me, therefore, that we must conclude that Mr. Voorhis is mistaken in relation to this matter.

The naked proposition which must be determined in this case, then, is whether the acceptance by the lender from the broker, of any portion of his commissions, constitutes usury?

It is claimed, upon the part of the defense, that Mr. Willet in this transaction was the agent of the plaintiff, and that consequently the plaintiff is bound by his representations. I am unable to see that Mr. Willet was any more the agent of the plaintiff than he was of the defendant, in fact. Mr. Voorhis was to pay him for his services in this matter, which would seem to indicate that he considered that Mr. Willet was his agent. But perhaps it is not of very great importance in the disposition of the question involved whether Mr. Willet was the plaintiff's or defendant's agent.

The case of *Estervex* agt. *Purdy*, decided in the court of appeals, but not yet reported, expressly decides that the representations of the agent of the lender do not bind the principal unless authorized by him, or the fruits of such representations are received by the lender with knowledge of their origin.

The question, then, in this case would seem to be, did the

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plaintiff receive the money from Willet for the purpose of evading the usury law, or for the purpose of receiving more than seven per cent for the loan of his money. I think that both of these propositions may unhesitatingly be answered in the negative. The evidence seems to show, beyond dispute, that at the time of agreeing to make the loan the plaintiff was not, in any manner, influenced in the making thereof by the promise of Willet to divide any commission which he might make upon the loan. At the time of agreeing to make the loan the plaintiff had no knowledge what commission Willet was to receive from Voorhis, or whether he was to receive any commission, and his desire seems to have been to invest his money in some good security at a legal rate of interest.

The plaintiff, in receiving this money from Willet, supposed that he was receiving a portion of that which belonged to Willet and which he had a right to dispose of as he saw fit. Under such circumstances I cannot see that there was any intent upon the part of the plaintiff to take from the defendant more than seven per cent for the use of his money.

The case of *Alger agt. Gardner* (54 N. Y., 380) is cited by the defendants as an authority to show that the case of *Condit agt. Baldwin* has been limited by subsequent decisions. The case of *Estervéz agt. Purdy* (*supra*), shows that the court of appeals do not consider that the case of *Condit agt. Baldwin* has been at all restricted by the case of *Alger agt. Gardiner*.

There is, however, another objection raised by the plaintiff in this action to the defense of usury as claimed to be established by the evidence in this case, and that is, that there is a fatal variance between the allegation of the answer and the evidence. It seems to be held in the case of *Hetfield agt. Newton* (3 Sandf. Ch. R., 564), and cases there cited, that usury must be strictly proven as alleged, and any variance is fatal. The allegations in the answer in this case are, that the plaintiff took \$2,900 in excess of legal interest for the loan or forbearance of the mortgage debt, while the evidence

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shows that the total amount received by the plaintiff was \$2,125, a variance which, according to the cases above cited, is fatal.

To obviate this objection the defendants, at the close of the case, moved to conform the pleadings to the proof. I do not understand that such a motion can ever be granted where the admission of the evidence has been promptly objected to, as was done in this case, upon the ground that the evidence did not tend to support the allegations in the answer.

I think, therefore, that the plaintiff is entitled to judgment of foreclosure and sale.

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SUPREME COURT.

CHARLES J. JOHNSON, respondent, agt. E. CLARK CARLEY and
LUCIEN GRAIN, impleaded, &c., appellants.

*Replevin — Goods fraudulently purchased — Evidence — Exceptions — Motion
for nonsuit.*

Defendants sought to prove by plaintiff's attorney that at the time of the service of the papers by which the action was commenced, he, plaintiff's attorney, had told them that if there was no defense interposed there would be no costs against them, the defendants. This evidence was objected to and rejected:

Held, that the evidence offered was immaterial so far as any defense to the action was concerned, and had no relation to any such defense. Under a general denial no such matter as that offered to be proven was admissible, because not set up or suggested by the answer.

Where another action similar in most respects to this was also pending against the same defendants in favor of another plaintiff, and was referred to the same referee, and it was agreed that the cases should be tried together, and the evidence taken should apply to both cases so far as the same was applicable, and it was so taken without any statement at the time by the counsel for either party, as to which case it was to be considered as taken in or applicable to, on motion by defendants that the entire evidence of three witnesses, and such portions of the evidence of the three defendants and four other witnesses named and all other witnesses as related to certain conversations be stricken out on the ground that the same was inapplicable thereto:

Held, that under the circumstances under which this evidence was taken the referee could not be required to do this. A wholesale motion of this character calling for a critical review of such a mass of evidence without any definite specification of such portions as were objected to ought not be granted. And this is especially so where a considerable portion of the evidence asked to be stricken out had been taken by the defendant, and all the evidence asked to be stricken out had more or less bearing upon the two questions which were principally litigated on the trial, viz: Whether the goods were fraudulently purchased, and

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whether the defendants as assignees, or under color of the assignment, assumed any control over them.

The circumstances proved on the trial tended to show that the purchasers at the time of the sale were insolvent, and knowing their condition, had bought the goods knowing that they would be unable to pay for them, and with a preconceived design not to pay for them:

Held, that these circumstances were all evidence of fraudulent intent.

The existence of the fraudulent intent in such a case is a matter to be inferred, if at all, from circumstances, and in general does not admit of more direct proof. The question of fraudulent intent is more or less speculative, and is often materially affected by circumstances difficult to represent in their full force by any statement of the evidence to an appellate court. The question is not whether the court would have found upon the evidence as the referee has found, but whether there was evidence before him which legitimately tended to sustain the finding.

The proof showed that the defendants, as assignees, did assume to control the property purporting to be assigned, and did prevent the plaintiff from peaceably taking possession thereof, and their attempts to evade all responsibility for so doing by professing unwillingness to accept the assignment, while keeping the goods under their lock and key and making evasive replies to the demands of the agents and attorneys for the plaintiff were unavailing to shield themselves from responsibility as custodians of the property, if not under the assignment, at least under color of it.

Fourth Department, General Term, October, 1876.

This action was brought to recover possession of certain personal property which the plaintiff had sold to the firm of Lynde Brothers, who shortly afterward assigned the same, together with all their other assets, to the defendants, by a general assignment for the benefit of creditors. The date of the assignment was April 7, 1873, and the date of the purchase was March 31, 1873. Just before purchasing these goods the Lynde Brothers had been embarrassed for want of funds, and shortly after the commencement of this action they compromised with their creditors at twenty-five cents on the dollar. The general assignment to the defendants was placed on file by their attorney, but at the time of the commencement of this action they had not qualified and their time for quali-

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fyng had not expired. They took possession of the store, locked the doors, closed the blinds, lowered the curtains, took the keys, and agreed between themselves that the store should not be opened unless they were all present. The plaintiff demanded his goods of them and they refused to open the store or surrender the goods, or give up the key, but still claimed, all the time, that they had nothing to do with the goods, and that they should not accept the assignment. Upon being told that if they assented or if they would permit, so far as they had control, the plaintiff would take his goods without action; they replied that if the sheriff had the papers of course, he could take them and that they should not resist the sheriff. They did not claim title to any of the goods, either in their pleadings or upon the trial, but alleged that they had no knowledge or information sufficient to form a belief as to whether or not the goods in question belonged to the plaintiff when this action was commenced. Another action against the same defendants, but in favor of a different plaintiff, was tried with this one under an agreement that the evidence taken was to apply to both cases so far as the same was applicable. The referee reported in favor of the plaintiff and the defendants brought this appeal. The other facts are stated in the opinion of the court.

Irving G. Vann, for respondent.

B. T. Wright, for appellants.

TALCOTT, J. — This is an appeal from a judgment entered on the report of a referee. The action was replevin for goods sold to the firm of Lynde Brothers, doing business as merchants at Marathon, New York, and the theory upon which the plaintiff reclaimed the goods was that they were fraudulently purchased whilst the firm of Lynde Brothers were insolvent, concealing and misrepresenting their circumstances, and with a preconceived design not to pay for the said goods.

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The referee reports in favor of the plaintiff, that the purchase of the said goods was fraudulent and made without the intention to pay for the same. The exceptions to which our attention is called are as follows:

1. The defendants sought to prove by Mr. Knapp, the attorney for the plaintiff, that at the time of the service of the papers by which the action was commenced, he, plaintiff's attorney, had told them that if there was no defense interposed there would be no costs against them, the defendants. This evidence, on objection, was rejected and the defendants excepted to the ruling. We think the ruling was correct. The evidence offered was immaterial, so far as any defense to the action was concerned, and had no relation to any such defense. Besides the defendants did defend the action, and the trial was then progressing upon allegations putting in issue the title of the plaintiff, and under a general denial, no such matter as that offered to be proven was admissible because not set up or suggested by the answer.

2. It seems that an action similar, in most respects, to this, was also pending against the same defendants in favor of Robert E. Hill and others, and was referred to the same referee, and the case shows, at the commencement, that it was agreed that the cases should be tried together, and the evidence taken should apply to both cases so far as the same was applicable. The trial proceeded under this arrangement, and any evidence applicable to either case was taken by the referee, and by the consent of the respective counsel without any discrimination as to which case it was offered in or in which case it was to be considered applicable. At the close of the evidence in the case the defendants made a motion as follows, viz., that the entire evidence of Vane, York and Robinson, and such portions of the evidence of Crane, Carley and Wheaton, the defendants, and the witnesses Squires, Husted, Tarble and Hawley, and the other witnesses, as related to the conversation which occurred at the meeting of the creditors of Lynde Brothers at Mr. Wright's office in Marathon, be stricken out,

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on the ground that the same was inapplicable thereto. We do not think that the referee could be required to do this under the circumstances under which this evidence was taken. The import of the arrangement was that the evidence should be taken whether in fact applicable to the one or the other case, and it was so taken without any statement at the time by the counsel for either party as to which case it was to be considered as taken in or applicable to. A wholesale motion of this character, calling for a critical review of such a mass of evidence without any definite specification of such portions as were objected to, was unfair toward the referee, and could only operate as a mere trap. But there are other and perhaps more sufficient reasons for the refusal to strike out: first, a considerable portion of the evidence asked to be stricken out had been taken by the counsel for the defendant; second, all the evidence asked to be stricken out had more or less bearing upon the two questions which were principally litigated on the trial — whether the goods were fraudulently purchased by the Lynde Brothers, and whether the defendants, as assignees of the Lynde Brothers, or under color of the assignment, assumed any control over them. For instance, Mr. Vane had stated in his testimony that in conversation with Carley, one of the defendants, the store of the Lynde Brothers having been locked up by the defendants, and on the application of Mr. Vane for leave to go into the store and inspect the goods as attorney and agent for Hill & Co., that he, Carley, did not like to let anybody go into the store. He said he had agreed with Grain and Wheaton, the other assignees, that the store should not be opened unless all three were present. Robinson's testimony also, portions of it, related to contemporaneous representations by Lynde Brothers, as to their pecuniary situation. Many other portions of the testimony of Vane, York and Robinson bearing upon the case of the plaintiff might be referred to, but it is a sufficient answer to the motion to strike out the entire testimony of Vane, York and Robinson to show that any portion of the testimony of any one of them could

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be applicable to the case in any view of it. So of the testimony of the other witnesses relating to the conversations which took place at the creditors' meeting referred to. Portions of such conversations related to the action of the defendants, who were then present, in reference to assuming control over the goods which had been assigned to them, and their resuming possession of the key of the store at the request of the creditors.

3. The defendants made a motion for a nonsuit on numerous grounds, founded upon the alleged insufficiency of the evidence, and our attention is specially directed to the first, second and seventh of the specified grounds of such motion : The first ground was in substance that there was no evidence of the sale to Lynde Bros., of the goods which were the subject of the suit. This fact was not only not litigated but assumed all through the trial, but the case contains an express admission of the fact at folio 73. The second ground was in substance that there was no proof that the vendees made any false representations, by which the sale was procured. The claim of the plaintiff was, not that the goods were purchased of him by means of any fraudulent representations made to him at the time of the sale, but that the purchasers being insolvent and knowing their condition at the time of the purchase, had bought the goods knowing that they would be unable to pay for them, and with a preconceived design not to pay for them. It had appeared that the goods were purchased of the plaintiff on the thirty-first of March. That the vendees made an assignment of all their property for the benefit of creditors about seven days thereafter, without any pretension that in the meantime any material change in their circumstances had occurred. The evidence further tended to show that before the purchase of the plaintiff, the defendants had made an accurate inventory of their assets, with a view of obtaining a loan, and that they then ascertained that their indebtedness greatly exceeded their assets. That after such examination the loan was refused to them and that they

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had ascertained that they could not go on with their business without effecting a compromise with their creditors, which they subsequently did at twenty-five cents on the dollar. That about the time when the said Lynde Bros. took the inventory referred to, one of the firm, on the purchase of goods from the plaintiff in the other case, represented their assets as at least \$3,000 above their liabilities. These were all circumstances tending to show that the vendees purchased the goods of the plaintiff with the fraudulent design not to pay for them, as found by the referee at a subsequent stage of the case. The existence of the fraudulent intent in such a case is a matter to be inferred, if at all, from such and similar circumstances, and in general does not admit of more direct proof. The seventh ground on which a nonsuit was urged is too general to call attention to any thing beyond what was specifically stated. It was only saying that on the whole the plaintiff was not entitled to recover. We think on the whole case the findings of the referee cannot be set aside as without evidence to sustain them. There can be no reasonable doubt but that the defendants as assignees did assume to control the property purporting to be assigned, and did prevent the plaintiff from peaceably taking possession thereof, and their attempts to evade all responsibility for so doing, by professing unwillingness to accept the assignment, while keeping the goods under their lock and key and making evasive replies to the demands of the agents and attorneys, for the plaintiff were unavailing to shield themselves from responsibility as custodians of the property, if not under the assignment at least under color of it.

As to the fraudulency of the purchase, in so much as, if the views herein expressed as to the motion for a nonsuit are correct, there was evidence tending to establish the fraud, we are unable to say that the referee erred in finding it. The question of fraudulent intent is more or less speculative, and is often materially affected by circumstances difficult to represent in their full force, by any statement of the evidence to

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an appellate court. The question is not whether we should have found upon the evidence as the referee has found, but whether there was evidence before him which legitimately tended to sustain the finding. On the whole we think the judgment must be affirmed.

Judgment affirmed.

MULLIN, P. J., and SMITH, J., concurred.

Bell agt. The Mayor, &c.

SUPREME COURT.

MIDDLETON BELL agt. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

When board of health a necessary party to an action against the city of New York.

Where a contractor had failed to perform his contract for the removal of "night soil," and the board of health passed a resolution and acted thereunder, directing its immediate removal:

Held, that the board of health, under the fifth section of chapter 636 of Laws of 1874, was a necessary party to an action by the contractor against the city of New York.

Special Term, April, 1876.

DEMURREE to answer.

Mr. Hooker, in support of the demurrer.

Mr. Deane, opposed.

VAN VORST, J. — The sixth paragraph of the defendant's answer, and to which the plaintiff's demurrer is interposed, alleges that the board of health, on or about the 29th day of July, 1873, passed a resolution, of which the following is a copy:

"*Resolved*, That the necessary arrangements be at once made to receive and take away the night soil, which the assignee under the Gallagher contract, and R. Dye, refused to provide a suitable place for and to receive."

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The passage of this resolution by the board of health, the demurrer concedes, as also the subsequent allegations, that the board of health passed the resolution after a careful examination made by their sanitary superintendent of the condition of the receptacles and place of deposit provided by plaintiff's assignee for the said night soil, on the Hackensack river in New Jersey, and because plaintiff, or his assignee, had utterly failed to perform his part of the contract.

Now, if the contractor failed to perform his part of the contract, by omitting to provide proper receptacles and places of deposit for the soil in question, it was certainly highly proper for the defendant, through its board of health, in the hot weather of 1873, to take measures immediately to remove the soil in question.

The passage of the resolution, and the action of the board, would be presumed to have arisen from a sufficient exigency, and the failure of the contractor and his assignee to act in the premises, would doubtless present such exigency.

By the fifth section of chapter 636 of the Laws of 1874, it is provided that in all actions or proceedings against the mayor, aldermen and commonalty of the city of New York, in which any action, order, regulation, ordinance or proceeding of the board of health shall be called in question, the board of health shall be a necessary party, and have the right to answer and take part therein.

It is quite evident that the action of the board of health in the premises will at least be called in question on the trial of this action. And I am of opinion that it is a necessary party defendant under the act of 1874, above alluded to.

There should be judgment for defendant on the demurrer, with leave to plaintiff to amend on payment of costs.

People agt. Bond Street Savings Bank.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE BOND STREET SAVINGS BANK.

Sale of property by order of the court — Refusal of deed — Resale asked for, because premises were sold at less than their value.

A court for mere inadequacy of price, unconnected with any other reason or cause, will not order a resale unless the price obtained be so grossly inadequate as of itself to furnish evidence of fraud.

Where property has been sold at a judicial sale, the court will not, when the sale has been well advertised and a large attendance of buyers secured, and there has been no surprise, misunderstanding or fraud, and no binding offer from any responsible party to pay a larger sum upon a resale, refuse to confirm such sale merely because some persons say they will pay a larger price hereafter, especially when such an opportunity has been fairly afforded and refused.

Ulster Special Term, July, 1877.

MOTION by purchaser to compel the receiver of an insolvent savings bank to convey premises bought at public sale.

Wingate & Cullen, for purchaser.

F. C. Barlow, for receiver.

WESTBROOK, J.— On the 28th day of June, 1877, certain premises in Willow street, city of Brooklyn, were, by order of the court, sold at public auction by the receiver of the Bond Street Savings Bank, through an auctioneer. On such sale, which was fully advertised and largely attended, Edgar McCullen became the purchaser for the sum of \$16,500, he

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being the highest bidder, and that, the highest sum bidden therefor. No want of notice, surprise, misunderstanding, unfairness or fraud is pretended, but a deed is refused, and the court is asked to permit and order a resale because the premises were sold at less than their value, the evidence thereof being an offer by the purchaser prior to the sale of \$18,500 therefor and its appraisal by persons, some of whom were present at the sale, at a price of about \$20,000. No stipulation, so as to be obligatory, from any person, is produced, promising if a resale is ordered to pay a larger sum for the property; but the court is asked to refuse a confirmation of the sale upon the sole and only ground of the inadequacy of the price.

That a court for mere inadequacy of price, unconnected with any other reason or cause, will not order a resale unless the price obtained be so grossly inadequate as of itself to furnish evidence of fraud, is a doctrine so well settled that citation of authorities to establish it is unnecessary. It is claimed, however, that because by the terms of sale the sale was to be subject to the approval of the court, therefore the general rule does not apply, and that the only question for the court to consider is the interest of the creditors of the bank.

The plain answer to this argument is, that the insertion of this clause in the terms of sale did not make them different from what they would have been if the clause had been omitted. The sale was in fact subject to confirmation by the court, without an express declaration to that effect. But such approval or refusal to approve is not granted or withheld upon arbitrary rules made for each case, but upon certain well-known principles applicable to all sales, the wisdom of which is proven by experience. If judicial sales are to be of any value in obtaining a fair price for property, they can only be made by giving the public to understand that the exposure of premises thereat means something more than a form and a mode to obtain the views of those who see fit to

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attend of the worth thereof in the form of bids. Let it be understood that any person can obtain a resale of property by declaring that he is willing to pay more for the same than the sum bid at the public competition, and he who wishes the premises will remain absent and take his chances in the future. Such practice cannot be tolerated, and hence whilst the court can wish, as it does in this case, that the premises had brought a larger sum, yet it will not, when the sale has been well advertised and a large attendance of buyers secured, and there has been no surprise, misunderstanding or fraud, and no binding offer from any responsible party to pay a larger sum upon a resale, refuse to confirm such sale merely because some persons say they will pay a larger price hereafter, especially when such an opportunity has been fairly afforded and refused. At the most, between \$3,000 and \$4,000 is the extent of the alleged sacrifice, and against such opinions is the controlling fact of a well advertised and well attended public sale, fairly conducted, evincing that the sum bid was the best price to be obtained.

An order must be entered confirming the sale and directing the delivery of the deed.

Vidrard agt. Fradneburg.

SUPREME COURT.

VIDRARD agt. FRADNEBURG.

Execution against the person—Jail limits—permission of creditor to go beyond—what amounts to a discharge.

If a creditor gives his debtor permission to go off the jail limits or to go at large, the right to imprison is gone, and the debtor cannot be again taken in execution for the same debt.

Where proceedings for discharge of defendant, who was in custody, were pending before the Oneida county court, on the twenty-third of December, but were not completed, defendant's counsel told the court that as Monday following was Christmas, "it was too bad to keep defendant in custody till Tuesday." The judge appealed to plaintiff's counsel for magnanimity, and he replied: "If the debtor appears on Tuesday no suit will be brought against the sureties on the jail-limits bond, but I do not mean to, nor do I wish to, waive any of my legal rights." The defendant, under these circumstances, went off the limits and did not return, and a second execution was issued after the county court had refused his discharge:

Held, that the defendant never had the permission of the plaintiff to go at large, and therefore, in the absence of legal proceedings for his discharge, he was rightfully taken into custody and remains rightfully imprisoned.

Herkimer Special Term.

MOTION to set aside execution and imprisonment of defendant. There was a conflict in affidavits, and a referee has found "that no agreement was ever made discharging the defendant from execution." After the defendant was in custody he instituted proceedings for his discharge in the Oneida county court, and they were heard before judge JONES from day to day, and when Saturday, December twenty-third,

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arrived they were not completed, and the defendant's counsel told the court that as Monday following was Christmas, it was "too bad" to keep defendant in custody till Tuesday. Thereupon the judge appealed to the plaintiff's counsel for magnanimity, and he replied: "If the debtor appears on Tuesday no suit will be brought against the sureties on the jail-limits bond, but I do not mean to, nor do I wish to, waive any of my legal rights." The defendant did, under these circumstances, go to Floyd, off the limits, and as he did not return to the limits, a second execution was issued, after the county court had refused his discharge. The defendant was taken and is now in custody of the sheriff of Oneida county.

Sayles & Flint, for motion.

A. C. Coxe, opposed.

HARDIN, J.—It is very well settled that if a creditor gives his debtor permission to go off the jail limits or to go at large, the right to imprison is gone, and the debtor cannot be again taken in execution for the same debt (2 *East*, 243; 5 *Johns.*, 364; 16 *id.*, 181; 7 *Cow.*, 274; 8 *id.*, 171; 9 *id.*, 128; 3 *Wend.*, 184). So, too, if the creditor consents to discharge one of several defendants all of the defendants are discharged and absolved from liability to arrest on the same judgment (44 *Barb.*, 347). The referee has found as a fact that no agreement was ever made discharging the defendant from execution. That finding must be accepted. But it is said by the learned counsel for the defendant that the legal effect of the statement made by the attorney for the creditor was to discharge the debtor. (1) The attorney had no power to discharge the debtor. (2) The attorney expressly stated he did not wish to and would not waive any of his legal rights. (3) It was not an agreement that the debtor might leave the limits, but if he did that no suit would be brought in the meantime by the attorney. The defendant's learned coun-

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sel refers to *Yates* agt. *Van Rensselaer et al.* (5 *Johns.*, 364). In that case the court found there was an agreement amounting to a permission that the defendant might go at large. Here is no such permission in fact or in legal effect, and therefore that case is not authority for the position taken by the defendant. There was no voluntary discharge by the creditor, and therefore *Poucher* agt. *Halley* (3 *Wend.*, 184) does not apply. In *Wesson* agt. *Chamberlain* (3 *Comst.*, 333) judge HURLBURT said that in the absence of any consent on the part of the plaintiff in execution the debtor was not discharged. He says: "As regards the sheriff, the escape was voluntary and he was responsible for it, but the debt was not thereby discharged as against the judgment debtor, and the plaintiff had a right to issue a new execution and retake the defendant (1 *Salkeld*, 272).

In this case the defendant never had the permission of the plaintiff to go at large, and therefore, in the absence of legal proceedings for his discharge, he was rightfully taken into custody and remains rightfully imprisoned.

The motion to set aside the second execution and for the discharge of the defendant must be denied, with ten dollars costs, and the referee's fees will be disbursements.

So ordered.

Salomon agt. Moral.

N. Y. COMMON PLEAS.

RUDOLPH G. SALOMON agt. DAVID MORAL and JEANNETTE MORAL.

Fraudulent conveyance — Action to set aside — Appeal — Law and fact.

Where defendant, who was insolvent, being apprehensive of the recovery of a judgment against him by plaintiff, in an action then on trial, and with intent on his part to hinder, delay and defraud his creditors, executed a conveyance of two certain pieces of property to his son, for the nominal consideration of \$1,500, but without actual consideration, and the son immediately conveyed them to his mother, the wife of the defendant, without actual consideration, but for the same nominal consideration: *Held*, that the conveyances were fraudulent and void as to the creditors of defendant then existing, and especially as to plaintiff and his judgment, which was recovered about one month after such conveyances.

That the wife of defendant had notice of her husband's fraudulent intent, may be inferred from the circumstances of the case (*See facts in opinion of DALY, J.*).

Where a debtor, with an intention of defrauding his creditors, executes a conveyance of his property without any valuable consideration being paid by the grantee, the conveyance is void as against such creditors, although the grantee was not privy to the fraud.

Where the wife had notice of the fraudulent intent of her husband in conveying the premises to her, and being therefore a party to the fraud, although her husband was actually indebted to her at the time, she is not entitled to a lien on the premises conveyed for the amount of such debt.

Although a review of both the law and the facts of a case tried by a judge or referee may be had at general term, yet, if no error be shown, the findings of fact, like the verdict of a jury, should be deemed conclusive.

General Term, June, 1877.

THE following opinion was rendered at special term, January, 1877, which, together with the findings of fact and conclusions of law, contain a complete statement of the case:

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DALY, J.—A large portion of the money used by the defendant David Moral, in the investments which he commenced to make in real estate in 1873, finally resulting in the purchase of the houses and lots in Fifty-first street (the subject of this action) in 1875, came from the sale of furniture in, and a mortgage executed upon, the house and lot 104 Lexington avenue, which house and lot stood in the name of his wife, the defendant Mrs. Jeannette Moral. This house and lot, 104 Lexington avenue, was bought in 1863 by David Moral, with money of his own, and the deed taken in his wife's name as a return for or repayment to her of certain moneys which she brought to him on their marriage in 1848. At the time he bought the house and lot in her name he was not in debt, and, as a gift even, the transaction cannot be questioned. In 1873, the house was leased and the furniture sold. He collected the rents, amounting to \$3,000 a year, for four years and disbursed it. He received \$4,000 upon a sale of the furniture (which, he says, was hers, *i. e.*, bought by him for her) and deposited it in the United States Trust Company in his own name. In March, 1873, he bought with that \$4,000 real estate in Fifty-seventh street, in conjunction with one Ellert, each investing \$4,000. The deed was taken in his name and not in his wife's. In September, 1873, the property was sold and he realized \$5,500 cash from it, of which he deposited \$4,600 in his own name in the trust company and afterwards with Greenbaum Bros., bankers. In April, 1874, he took that money, and, with \$800 more, bought in his own name three mortgages on three houses and lots in Fifty-first street. In August, 1875, prior mortgages on those houses and lots were foreclosed and he bought them in in his own name. In order to raise more money to effect the purchase, his wife and he executed a mortgage for \$4,500 on the Lexington avenue property, of which he used \$2,493 in securing the Fifty-first street property. In October, 1875, he sold one of the houses and lots in Fifty-first street for \$10,750, realizing \$3,602.91 cash, of which he used \$2,000 to

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make a payment on account of the mortgage above referred to on the Lexington avenue property.

In June, 1876, when he was apprehensive of the recovery against him by Salomon, the plaintiff, of a judgment in an action then on trial, he conveyed the remaining two houses and lots in Fifty-first street to his son for the nominal consideration of \$1,500, but without actual consideration, and the son immediately conveyed them to the defendant Jeanette Moral, his mother, the wife of David Moral, without actual consideration but for the same nominal consideration of \$1,500.

This action is brought to have these last-mentioned conveyances set aside and declared fraudulent and void as against this plaintiff and other creditors of David Moral who may join in the action.

So far as the evidence enables me to trace the sources of the moneys invested by David Moral in these two houses and lots in Fifty-first street, it would seem that \$6,493 of it came from the sale or mortgaging of property to which Mrs. Moral had a good title, that is, \$4,000 invested by David in the Fifty-seventh street property in 1873 was the proceeds of the sale of his wife's furniture, and \$2,493 used by him to secure the three houses and lots on Fifty-first street upon the foreclosure in 1875 was part of the proceeds of a mortgage given at that time on his wife's house in Lexington avenue. But, of this \$6,493, \$2,000 has been paid back to her, because, when one of the Fifty-first street houses was sold to Arnold in 1875, David Moral received \$3,602.91 cash and used \$2,000 of it to reduce the mortgage, to which I have just referred, given a short time before on his wife's house in Lexington avenue. None of the moneys collected by David Moral as rent of his wife's house, and no other proceeds of any property belonging to her, are traced into the purchase-money of the two houses and lots on Fifty-first street, the subject of this action, and her interest therein, if she be entitled to any,

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and if the property do not belong to her, a question I shall now discuss, amounts at most to \$4,493.

It is claimed by defendants that in using his wife's money to purchase the Fifty-seventh street property, in selling that and investing in the bonds and mortgages on Fifty-first street, in buying the latter property upon foreclosure and in receiving, depositing and disbursing the moneys received and paid out during these successive investments, the defendant David Moral was acting as agent of his wife, and that the titles, though taken in his name, were hers, she being ignorant of his acts in that particular.

This claim of agency rests upon no stronger foundation than the oath of Mr. and Mrs. Moral, and contradicts all the records and their own written and solemn declarations during the periods from 1871 to the day of trial. That oath is made at a time when it is of the greatest importance to them to make the claim, while the declarations I have mentioned were made at a time when there was no temptation to falsify on this important point. David Moral deposited and drew out these moneys from 1871 to 1876, in his own name, and took and gave every deed in his own name, his wife joining in such deeds and releasing her dower. In a mortgage executed by them on this property on Fifty-first street and on the Lexington avenue property in 1875, to secure certain indebtedness of the firm of Salomon & Moral, of which their son was a member, Mrs. Moral covenants to charge her separate property, and expressly designates the Lexington avenue property as her separate estate.

In a written declaration, made in the same matter at about the same time, David Moral, to show his solvency, declares himself to be worth \$25,000 exclusive of the real estate which I (he) own in Fifty-first street and Lexington avenue. Defendants now declare that all the investments made were so made after consultation between them, and Mrs. Moral approved or directed them all, her husband acting according to her instructions, but that she was wholly unaware that he had taken

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deeds to himself instead of to her; that this incorrect and unauthorized act was communicated to her by her son in June last, and she immediately demanded of her husband that he transfer the titles to her. He did so in time to avoid levy under the plaintiff's execution. So far as David Moral and his son and grantee are concerned, they hastened to make the conveyances to Mrs. Moral, in order to avoid trouble apprehended from plaintiff's judgment. As for Mrs. Moral, she only knew from conversations of theirs that there was trouble, but her demand of the conveyances was induced simply by a desire to have her own, the proceeds of her money; such is their testimony.

The whole evidence establishes in my mind that Mrs. Moral intrusted her husband with whatever money he got out of the Lexington avenue house and furniture to use as his own, and that at most he became her debtor only for the amount. This view is consistent with their financial dealings since their marriage. She brought him a dowry of \$5,000 in 1848, which he used as his own in business. In 1863, he repays it by buying the Lexington avenue property in her name; in 1871, he concludes to speculate with the proceeds of the furniture, and with that and other funds of his own comes on an active and successful business as real estate agent, until it results in his ownership of the property now in question. The prospect of a heavy judgment against him induces the pretense that this property is not, in fact, his own, and that he has been acting all along as the agent of his wife. I cannot but believe this to be an after-thought, and that the conveyances to his wife were made to hinder, delay and defraud his creditors, and that Mrs. Moral had notice of his intention. But there is no evidence that Mrs. Moral intended any of her moneys used by her husband as a gift, nor other than a loan, and in declaring the conveyances void as against his creditors, it is equitable to declare a lien upon the premises in her favor to the extent of the sum of \$4,328.66 of her money, with which the premises were purchased, and interest from June,

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1876; the above sum representing two-thirds of the amount (\$6,493) originally invested in the three Fifty-first street lots. Upon a sale in this action her lien should be first satisfied. Costs to plaintiff.

Judgment accordingly.

This cause having been tried before me, I make and file the following findings of fact:

I. That, on the 26th day of July, 1876, the plaintiff recovered a judgment in this court against the defendant, David Moral, for the sum of \$3,878.68, which said judgment was on said day duly docketed in the office of the clerk of the city and county of New York.

II. That, on the 21st day of August, 1876, an execution was issued upon said judgment to the sheriff of the city and county of New York, where said defendant then resided, and that the said execution has been returned wholly unsatisfied.

III. That the said judgment remains wholly unpaid.

IV. That, on the 22d day of June, 1876, the defendant, David Moral, being the owner of the real estate hereinafter described by deeds bearing date on that day, and recorded in the office of the register of the city and county of New York, in liber 1,372 of conveyances, pages 257 and 260, on the 27th day of June, 1876, conveyed to one Bernhard Moral, his son, the following described premises, viz.:

All those two certain lots, pieces or parcels of land, with the buildings and improvements thereon erected, situate, lying and being in the city of New York, taken together bounded and described as follows: Beginning at a point on the north-erly side of Fifty-first street distant two hundred and thirty-five feet eight inches easterly from the north-easterly corner of Fifty-first street and First avenue, running thence north-erly parallel with First avenue and partly through the center of a party-wall one hundred feet five inches; thence easterly and parallel with Fifty-first street thirty-three feet four inches; thence southerly parallel with First avenue one hundred feet

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five inches to the northerly side of Fifty-first street, and thence westerly along the northerly side of Fifty-first street thirty-three feet four inches to the point or place of beginning.

V. That the said Bernhard Moral, by deeds bearing date June 26, 1876, and recorded in said register's office in liber 1382 of conveyances, pages 374 and 376, on the 29th day of June, 1876, conveyed the same premises to his mother, the defendant Jeannette Moral, the wife of the defendant David Moral.

VI. That, said conveyances were made without any consideration, although each of said deeds purported to have been made for the consideration of the sum of \$1,500.

VII. That, at the time of the making of said conveyances, the said David Moral was wholly insolvent, and that said conveyances were made with intent to prevent the judgment recovered by the plaintiff against the defendant David Moral from becoming a lien upon the property thereby conveyed, and with intent, on the part of David Moral, to hinder, delay and defraud his creditors, and that the defendant Jeannette Moral had notice of such intention at the time.

VIII. That, at the time of the making of said conveyances, the defendant David Moral was indebted to the defendant Jeannette Moral, his wife, in the sum of \$4,328.66 for moneys previously loaned by her to him. And I find as conclusions of law :

I. That the aforesaid transfers and conveyances by said David Moral to said Bernhard Moral, and by said Bernhard Moral to said Jeannette Moral, were, and each of them are, fraudulent and void as to the creditors of the said David Moral then existing, and especially as to the plaintiff and his judgment aforesaid, and should be deemed fraudulent and void as against the said judgment.

II. That said judgment became and was a valid lien on the real property so transferred as aforesaid, situated in the city and county of New York, and such real estate was liable to

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be sold thereunder the same as if such transfers and conveyances had not been made.

III. That the plaintiff is entitled to judgment decreeing the said real estate to be sold, and that out of the proceeds of such sale, after deducting the expenses thereof, the plaintiff be paid the costs of this action hereby awarded to him, and also the amount of his judgment against the defendant David Moral, with interest thereon, or so much thereof as the purchase-money of said premises will pay of the same, and that the surplus, if any, be paid to the defendant Jeannette Moral.

J. F. DALY,
J. C. C. P.

The cases cited upon the settlement of findings show clearly that Mrs. Moral, having notice of the fraudulent intent of her husband in conveying the premises to her, and being, therefore, a party to the fraud, although her husband was actually indebted to her at the time, is not entitled to a lien on the premises conveyed for the amount of such debt.

J. F. D., J.

Richard S. Newcombe, for defendant, appellant. The learned judge erred in finding that the property in question was not, in equity, the property of Jeannette, bought with her money, and the title taken in her husband's name, without her assent. There was no evidence contradicting the evidence of the defendants in this regard, and it not being intrinsically improbable, the court could not disregard it. The evidence, therefore, being all one way, the finding of the learned judge was clearly wrong. Upon the evidence, and the finding as the defendant Jeannette Moral insists it should be, the law is well settled (*Holden agt. Burnham*, 5 *Supreme Ct. R.*, 195; *Safford agt. Hynes*, 39 *Barb.*, 625; *Brown agt. Cherry*, 57 *N. Y.*, 645; *Lomisbury agt. Purdy*, 18 *id.*, 515; *Ryan agt. Dox*, 34 *id.*, 307; *Sanford agt. Noris*, 4 *Abb. Ct. Apps.*, 144). The paper introduced at folio 136, is no proof

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that Jeannette was not the equitable owner of the Fifty-first street property, any more than it was proof that David owned, which he clearly did not (*see judge's opinion*), the Lexington avenue property. It was no evidence at all against Jeannette. The learned judge found that when the conveyances in question were made, David was justly indebted to Jeannette for money loaned in the sum of \$4,328.66. Being so indebted he had a right to convey to her and she to receive property in payment. What he conveyed was no more than a just amount in value for the debt he owed. That he thereby created a preference in her favor is no objection. The law allows a debtor to make a preference (5 *Cow.*, 547; 6 *id.*, 287; 7 *id.*, 735; 11 *Wend.*, 187). The clear weight of evidence is, that Jeannette did not know of any fraudulent intent on the part of the husband, if he had any, in making the conveyance. Mere knowledge of his embarrassed condition, and that he desired to prefer her, would not invalidate the conveyance (*Bedell agt. Chase*, 34 *N. Y.*, 386; *Laidlow agt. Gilmore*, *C. P.*, 47 *How.*, 67, *affd. Ct. of Apps*; *Carpenter agt. Muren*, 42 *Barb.*, 300; *Auburn Ex. Bank agt. Fitch*, 48 *id.*, 344; *Schaffner agt. Reutner*, 37 *id.*, 44; *Waterbury agt. Sturtevant*, 18 *Wend.*, 363; *Malony agt. Horan*, 12 *Abb. [N. S.]*, 289). She did not in anywise unite in any fraud; she did not even join in the deed of her husband. She simply took what she claimed was her own; or, at the most, a preference for the debt due her. The decree should be reversed.

Blumenstiel & Ascher, for plaintiff, respondent. Exceptions to conclusions of law, where the cause is tried by the court without a jury, are indispensable to raise any question for review (*Enos agt. Englehardt*, 32 *N. Y.*, 444; *Weed agt. N. Y. and Harlem R. R. Co.*, 29 *id.*, 616; *Russel agt. Duflon*, 4 *Lans.*, 399; *Walsh agt. Washington Marine Ins. Co.*, 32 *id.*, 427; *Renauld agt. Peck*, 2 *Hilt.*, 137; *Elwell agt. Dodge*, 33 *Barb.*, 336; *Valton agt. National Fund Life Ins. Co.*, 20 *N. Y.*, 32; *Newlin agt. Lyon*, 49 *id.*, 661; *Brewer*

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agt. *Irish*, 12 *How.*, 481; *Code*, § 268; *Remedial Code*, § 1353). Whether there is evidence to support a conclusion of fact is a question of law (*Gage* agt. *Parker*, 25 *Barb.*, 141; *Mason* agt. *Lord*, 40 *id.*, 476; *Beck* agt. *Sheldon*, 48 *id.*, 365; *Putnam* agt. *Hubbell*, 42 *id.*, 106). It is admitted and proven beyond contradiction that the judgment was recovered and execution issued and returned unsatisfied, and that the judgment debtor has no property out of which to satisfy plaintiff's claim, except it be the property claimed herein to have been fraudulently conveyed. It is also established that, at the time of these transfers, not only did the demand of the plaintiff exist, but suit therefor had long previously been commenced and had substantially been determined in favor of the plaintiff, the testimony before the referee having been finished a day or two before the conveyances were recorded, and the defense of defendant ruled out. It is also expressly admitted that although the deeds to Bernhard Moral and Jeannette Moral recite a consideration of \$1,500, that, in point of fact, no money passed at the time of the conveyance. It is also shown that David Moral purchased the property at a foreclosure sale instituted upon mortgages formerly owned by David Moral on these houses and another; that the mortgages were originally assigned to him, held in his own name for several years, and he collected the interest; that, having purchased the property at the referee's sale, he gave his own checks therefor, took the title in his own name, sold one of the houses in his name, and made the usual covenant of seizin and warranty, in which his wife joined, and conveyed expressly her dower right only; that David Moral, in November, 1875, gave a mortgage, with his wife, to the creditors of Salomon & Moral to secure the settlement then made, in which she expressly referred to this property as being that of her husband. Against this and other proof disclosed in the case, we have the statement that the original consideration for which the mortgages were obtained came from the wife thirty years ago, and that Moral

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took them in his name, and also took the deeds in his name without her knowledge and consent. We call the attention of the court to the improbability, in point of fact, of the defendants' story. David Moral and his wife always lived together; he exercised sole control over the mortgages and deeds; gave his own checks, all the moneys being in his own name in the banks; collected the interests and rents; sold one of the houses with his wife's consent and received the moneys and put it in his name, she conveying her dower right; gave a mortgage upon the property to creditors, and especially therein covenanting that she was not the owner, etc. She knew all about this, and David Moral, besides, made a written statement, in which he claimed to own this property, so that, aside from the probability of the story itself, the acts of the parties are all inconsistent either with ownership of the property in Mrs. Moral or ignorance of the fact of David Moral owning the property. The judge was justified in so finding. These conveyances being *prima facie* voluntary, and made by one indebted and insolvent, are presumably fraudulent and void. This we established before we rested the case. A voluntary conveyance is a conveyance without any valuable consideration (*Bump on Fraud. Conv.*, p. 279), and the law presumes a fraudulent intent on the part of the grantee of such a conveyance by the mere acceptance of the transfer (*See Bump on Fraud. Conv.*, p. 280; *Mohawk Bk. agt. Atwater*, 2 Paige, 54; *Van Wyck agt. Seward*, 18 Wend., 375; see p. 392 and onward particularly; *Reade agt. Livingston*, 4 Johns. Ch. R., 481; *Wood agt. Hunt*, 38 Barb., 302). Where a party receives a conveyance of land from an insolvent without actually paying, receiving or becoming bound to pay any consideration therefor, no further proof of knowledge, or notice of the fraudulent intent of the grantee against his creditors is necessary in order to charge the grantee with complicity in the fraud (*Holmes agt. Clark*, 48 Barb., 237; *Bennet agt. McGuire*, 58 id., 625; *Newman agt. Cordell*, 43 id., 448).

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The intent to defraud need not be established by direct proof; it may be inferred or presumed from the knowledge of other facts (*Van Wyck agt. Seward*, 18 *Wend.*, 375, especially page 395). "Men do not often declare their purpose when they are about to do an act injurious to others, and we have no means of arriving at a knowledge of the internal resolve or determination of the actor but by reasoning and drawing inferences from his external conduct. To this kind of presumption we constantly resort, not only in civil but in criminal cases. When a debtor gives away all his property, it is a necessary consequence of the act that the creditor is injured—that he is defrauded. This consequence the debtor intended to produce. He may also have had some other purpose in view, but this intent was part and parcel of the act. If a man, after contracting a legal obligation, makes a voluntary conveyance of all his property, the language of the act is that he intends to put it out of the power to obtain satisfaction if the contract shall be broken (*Case above cited*; *Babcock agt. Echler*, 24 *N. Y.*, 823; *Newman agt. Cordell*, 43 *Barb.*, 456; see *Bump on Fraud. Conv.*, pp. 282, 283, and cases there cited). A voluntary conveyance is a badge of fraud, for its natural and probable tendency is to delay, hinder and defraud creditors (*See Bump*, 284). It is *prima facie* evidence of an intent to delay, hinder or defraud creditors (*Bump on Fraud. Conv.*, p. 285, and cases cited). The burden of proof is thrown upon the grantee to establish the circumstances which will repel the presumption of a fraudulent intent. The transfer stands condemned as fraudulent, unless the facts which may give it validity are proved by him (*See the cases cited on pages 286, 287 of Bump on Fraud. Conveyances*; *Dunlap agt. Hawkins*, 59 *N. Y.*, 342). To rebut the presumption of fraud, the proof must be clear, full and satisfactory (*See, also, Savage agt. Murphy*, 34 *N. Y.*, 508). Such conveyances will be set aside at the suit of a creditor whose claim is even in tort (*Jacobson agt. Myers*, 18 *Johns.* 425; *Fox agt.*

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Hill, 1 Conn., 295; *Howe* agt. *Ward*, 1 Greenl., 195). It therefore follows that upon the pleadings and proof of insolvency, and the judgment and execution, a *prima facie* case is established. The court having found that the conveyances were made with intent to hinder, delay and defraud creditors, and that Mrs. Moral had notice at the time of such intention, she became a party to the fraud and could not obtain a benefit under such fraudulent conveyance. At most, she was only a general creditor having no judgment. This doctrine is universal and established by the following cases: *Bump on Fraudulent Conveyances*, 572, 573; *Riggs* agt. *Murray*, 2 *Johnson*, 565, 582; on appeal, 15 *id.*, 571; *Sands* agt. *Codwise*, 4 *id.*, 536; see pages 585, 596; *Wood* agt. *Hunt*, 38 *Barbour*, 302; *Briggs* agt. *Mitchell*, 60 *id.*, 288; see page 314; *Harris* agt. *Sumner*, 2 *Pickering*, 38; *Bean* agt. *Smith*, 2 *Mason*, 252; *McKee* agt. *Gilchrist*, 3 *Watts*, 230; see page 233; *Cadagan* agt. *Kennett*, *Cooper*, 434; *Wilson* agt. *Hoar*, 15 *Iowa*, 489; *Price* agt. *Masterson*, 35 *Alabama*, 483; *Foster* agt. *Grigsby*, 1 *Bush*, 86; *Goodwin* agt. *Hammond*, 13 *California*, 168; *Stovall* agt. *Farmers' Bank*, *High Court of Errors*, 16 *Mississippi*, 305; *Holland* agt. *Croft*, 20 *Pickering*, 321; *Bleakley's Appeal*, 66 *Pennsylvania*, 187; *Peters* agt. *Smith*, 4 *S. C. Eq.*, 197; *Borland* agt. *Walker*, 7 *Alabama*, 269; *Brooks* agt. *Caughan*, 4 *Head*, 464; *Wiley* agt. *Knight*, 27 *Alabama*, 336; *Williamson* agt. *Goodwyn*, 9 *Grattan*, 506; *Rathbone* agt. *Stevens*, 15 *Connecticut*, 26. The court was warranted by the evidence in making its judgment, and the same should be affirmed with costs.

LARREMORE, J. — Although a review of both the law and the facts of a case tried by a judge or referee may be had at general term, yet if no error be shown, the findings of fact like the verdict of a jury should be deemed conclusive. Otherwise, a retrial of the cause would necessarily occur on the argument of the appeal.

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The plaintiff, a judgment creditor of the defendant, David Moral, brought suit to set aside three deeds of conveyance of premises, situated on the north side of Fifty-first street in the city of New York, on the ground of fraud, and that the same were so made with an intent on the part of Moral to hinder, delay and defraud his creditors. A full statement of the facts is found in the decision of the court below, from which it appears that said deeds were made by Moral (who was then insolvent), without any consideration and with fraudulent intent, of which the grantee Jeannette Moral, the wife of David Moral, had notice. After careful examination of the case, I have reached the conclusion that there is evidence to sustain the judgment. The property was conveyed about a month previous to the entry of plaintiff's judgment, and under circumstances of suspicion. The defendants sought to establish the good faith of the transaction upon the principle of equitable conversion; that the property in suit though originally conveyed to the husband, was in reality purchased by the property of the wife. Whatever equities may exist between the parties to the deeds are entirely independent of the rights of the plaintiff.

Mrs. Moral, the grantee, had notice (says the court) of her husband's fraudulent intent and this may be inferred from all the circumstances of the case (*Babcock agt. Eckler*, 24 N. Y., 623; *Bigelow agt. Zimmerman*, 7 Wend., 436; *Bennett agt. McGuire*, 58 Barb., 625).

Even without her privity the conveyance if voluntary would be fraudulent as against creditors (*Mohawk Bank agt. Atwater*, 2 Paige, 54).

After a review of all the evidence, I am for affirming the judgment.

ROBINSON and C. P. DALY, JJ., concurred.

Heelas agt. Slevin.

N. Y. SUPREME COURT.

ELOY A. HEELAS and others agt. JOHN SLEVIN and others.

Reformation of a written instrument — what must be proven — Tender.

To justify a court of equity in changing the language of a written instrument sought to be reformed, it must be proven, and that by proof so clear and convincing as to leave no room for doubt, that it was the intention of both parties to make a contract, not as it appears, but as it is claimed it should have been, and that the intent was frustrated by fraud or mutual mistake.

It is not enough for the party seeking the reformation to show his own intention, and that he never agreed to the terms of the contract. His remedy, in such case, is to have the contract canceled on that ground.

A tender is not good which was accompanied by a condition which was not called for by either the bond or mortgage, in payment of which the tender was made.

Special Term, May, 1877.

VAN BRUNT, J. — Voluminous briefs and many citations of authorities have been furnished by both sides, for the purpose of showing that the descriptions contained in the contract and deed, by which the premises mentioned in the complaint were conveyed, excluded from or included in the grant, the fee to the middle of Broadway, in front of the premises in question. As, in the disposition of the issues involved in this case, I have nothing to do with this question, I don't propose to give a merely legal opinion upon the subject.

The main issue presented, is that of the right of the defendants to a reformation of the deed conveying the premises in question, so as to include in the grant the street lying in front of the premises. From the evidence it appears that the oral

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contract was made between Mrs. Heelas and James Slevin, now deceased.

It is well settled, that to justify a court of equity in changing the language of a written instrument sought to be reformed, it must be proven, and that by proof so clear and convincing as to leave no room for doubt, that it was the intention of both parties to make a contract, not as it appeared, but as it is claimed it should have been, and that this intent was frustrated by fraud or mutual mistake. It is not enough for the party seeking the reformation to show his own intention and that he never agreed to the terms of the contract. His remedy, in such case, is to have the contract canceled on that ground (*Jackson agt. Andrews*, 59 *N. Y.*, 244; *Mead agt. Westchester Fire Ins. Co.*, 64 *id.*, 453).

This contract and conveyance were made in the year 1867, and no claim was made that the contract did not express the intention of the parties, until the beginning of the year 1877.

Mr. James Slevin being dead, it is sought to establish his intention by the evidence of the plaintiff, Mrs. Heelas. The whole effect to be given to her testimony is, that the property was spoken of at the time of the negotiation for its purchase, as property fronting on Broadway, which it undoubtedly did do. There is no evidence, whatever, but what Mr. Slevin knew at the time he executed the contract, exactly what its provisions were, and what the makers of that contract agreed to convey thereby.

It appears from the evidence that he had a lawyer to examine his title, who, undoubtedly, was familiar with the rights which Mr. Slevin claimed under that contract. There is no evidence that Mr. Slevin, in his lifetime, made any claim, whatever, that there was any mistake in the terms of the contract, although the "act for the widening of Broadway" was passed some three years prior to his death.

I cannot but come to the conclusion, that the evidence totally fails to show any mutual mistake in regard to the terms of this contract. It is more than probable that neither party

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thought it of any consequence, or cared at the time of making the contract, whether the description carried the grant to the middle of Broadway or not. And I am unable to conclude from the evidence that Mr. Slevin, at the time of receiving the contract, supposed that the fee of the street was being conveyed.

The delivery of the title deeds, by Mrs. Heelas, does not at all militate with this conclusion, because nothing would be more natural than the handing over of all papers which might in any way aid in the investigation of the title of the premises contracted to be sold. It follows, that the defendants have failed to furnish that clear and convincing proof which is necessary to entitle them to a reformation of the contract and deed.

The case of *White's Bank of Buffalo agt. Nichols* (64 N. Y., 65), would seem to define the rights of the parties under this contract.

The only other question to be considered, is that in relation to the \$2,400. The version of that transaction, as given by the defendant Slevin, seems to me to be much more reasonable, and commends itself much more strongly to my judgment than the history of the transaction given by the Guests. It is also a significant circumstance that the plaintiff Francis B. Guest was never examined as a witness, although it was clearly foreshadowed by the pleadings that it was claimed that he had participated in this transaction relative to the extension of the mortgage. If he had been able to corroborate the other testimony upon the part of the plaintiffs, he certainly would have been examined as a witness. I think, therefore, that the defendants are entitled to have the \$2,400, with interest, credited upon the mortgage.

The tender claimed by the defendants was not a good tender, because it was accompanied by a condition which was not called for by either the bond or mortgage, in payment of which the tender was made.

The plaintiffs are entitled to judgment accordingly.

Matter of Schreiber.

SUPREME COURT.

In the matter of the appeal of JOSEPH SCHREIBER from action of the common council of the city of Utica in relation to the opening and extension of Erie street in said city.

Opening of streets in city of Utica — what proceedings necessary — Laws of 1862, chapter 18 — Appeal.

The provisions of the statute (*Laws of 1862, chap. 18*) in relation to the duties of the common council of the city of Utica, in proceedings for the opening and extension of streets in that city, must be strictly followed.

By section 85 of the charter, if the common council, under its provisions, after hearing the parties interested, should determine to make the improvement, *it is obligatory on them to enter in its minutes a resolution declaring such determination.* An omission to comply with section 85 is fatal to all the proceedings which followed.

On an appeal from action of the Utica common council, the original papers were filed with the county clerk in time, but the copies were not served until the twenty-first day after the second report of the commissioners appointed therefor had been filed. The objection is taken at the hearing of the appeal, that the appeal papers were not served in time:

Held that the respondent should have moved to dismiss the appeal, and not having done so and allowing a special term to pass, he waived his right.

Onerda Special Term, July 18, 1877.

THIS was an appeal from action of the Utica common council, brought into this court pursuant to the provisions of the Utica charter, which is chapter 18, Laws of 1862.

The charter requires that the appeal be made by serving upon the clerk or mayor, or city clerk, a copy of the appeal papers, affidavits, &c., within twenty days after the second

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report of the commissioners appointed to open the said street was filed with the city clerk ; and by filing the original appeal papers with the county clerk within the same number of days.

The original papers were filed with the county clerk in time, but the copies were not served until the twenty-first day after the second report of the commissioners appointed therefor had been filed.

The city charter requires that within thirty days after the appeal is taken, the common council shall return, under the city seal, certified copies of all the proceedings of the common council in relation to the matter, and file the same with the county clerk, and that the hearing on said appeal shall come on at the next special term thereafter.

One special term passed and thereafter, and within the thirty days allowed therefor, the city filed said return with the county clerk. No motion to dismiss the appeal was made, and objection that the appeal was not made in time, that the papers were not served within the twenty days, was first taken on the argument of the appeal. Other facts appear in the opinion.

Lindsley & Dunmore, for appellant.

O. A. White, for respondent.

Noxon, J. — This is an appeal to the supreme court from the action and proceedings of the common council of the city of Utica, in extending Erie street in said city to Whitesboro street. A petition for such purpose was presented to the common council on June 4, 1875, and on that day referred to the committee on streets and bridges. At the meeting held on that day a resolution was adopted directing the clerk to publish legal notice that the council intended to extend Erie street to Whitesboro street, and that the council would act thereupon at a meeting to be held June eighteenth. In the

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return of the appeal no such notice appears to have been published, and no meeting of the council appears to have been held on June eighteenth. On the 2d of July, 1875, at a meeting of the council, a resolution was adopted directing the city surveyor to ascertain and report the expense of the improvement, and as to other matters required by section 84 of the city charter. At a meeting of the council, July 16, 1875, the city surveyor made a report in pursuance of the resolution of July second. At said meeting a resolution was adopted that the clerk publish legal notice requiring all persons interested in the matter of extending and opening Erie street to attend a meeting of the council, to be held August sixth, and that application would be made to the recorder's court, August ninth, at 4 P. M., for the appointment of commissioners therefor. The city surveyor in his report reported as to the expense of the improvement; that no part of the expense should be borne by the city; that property required to be appropriated, naming Mrs. Ballou, lot 68, Downer & Kellogg, lot 69, Thompson & Wilcox or R. B. Smith, lot 70, and referred to a map made and filed July 13, 1875, with the city clerk. The property that might be benefited was also contained in the report. Pursuant to said resolution a notice was published in the three official papers of the city that the council had determined to lay out, open and extend Erie street, and that no agreement had been made for the purchase of the land deemed necessary for the extension, and notified all persons interested that they would be heard, if desired, at a meeting to be held August sixth, and that the report of the surveyor (which was annexed to the notice) described the land necessary for the improvement and the portion of the city deemed benefited thereby, and that application would be made to the recorder August ninth, for the appointment of commissioners to ascertain damages and to apportion and assess the same. By section 84 of the charter (*chap. 18, Laws of 1862*) the common council had no authority to determine to make the improvement prior to making the order that an

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officer of the city make the report referred to in said section. The notice specified in said section was for a meeting to be held August sixth, and at that time the council was to proceed and hear the allegations of the owners and occupants, and after hearing the same, make such further order in respect to the improvement as it should deem proper (*Section 84 of charter*).

From the return of the common council to the appeal it does not appear that any meeting was held on the sixth of August, or at any other time, at which a hearing was had. The proceedings do not show that there ever was a determination of the common council to make the improvement. By section 85 of the charter, if the common council, under its provisions, after hearing the parties interested, should determine to make the improvement, it was obligatory on them to enter in its minutes a resolution declaring such determination. The notice first published on the 29th of July, 1875, setting forth that the common council had determined to extend the street, has no tendency to show any determination. If any determination was had or made, it could not have been prior to August sixth, and in the absence of any evidence showing the action and determination of the common council, by resolution or otherwise, the whole proceeding was, and is utterly void. The provision of the statute in these cases must be strictly followed. The omission to comply with section 85 is fatal to all the proceedings which followed. By section 87, a copy of a resolution of determination, together with a map, is to be filed in the city clerk's office. The map is returned, but no resolution. By section 88, a notice of eight days is to be published of the application to the court, for the appointment of commissioners, and a copy of the notice is to be served upon the owner, five days before the time. The time to appear was August ninth. The hearing was in fact had August 16, 1875, and no evidence is given of an adjournment or postponement of court from August ninth to August sixteenth. On the thirteenth of August the com-

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mon council adopted a resolution that the chairman of the committee on streets, with the city attorney, appear before the recorder August sixteenth, to apply for commissioners to ascertain damages, &c. The resolution was not published, and the same was not authorized by the charter. In view of the errors accompanying this proceeding, and the disregard of the plain provisions of the statute, I am constrained to hold the whole proceeding void. The objection is taken at the hearing of the appeal that the appeal papers were not served in time. The papers were actually filed in time. The respondent should have moved to dismiss the appeal. Not moving to dismiss the appeal and allowing a special term to pass, waived his right. The authorities of the appellant fully covers the point, to which may be added 2 *E. D. Smith*, 139; 27 *Howard*, 335.

The appellant is entitled to judgment upon the appeal, vacating and dismissing the proceedings of the common council, with costs of appeal.

Callender agt. Callender.

N. Y. SUPREME COURT.

SARAH J. CALLENDER agt. WILLIAM E. CALLENDER.

Action by a wife to restrain the use by a husband of a written confession of adultery obtained from her by fraud and duress — Complaint — Demurrer.

Where a husband, having obtained from his wife, by fraud and duress, a confession, in writing, that she had committed adultery, commenced an action against her for divorce upon the ground of adultery :

Held, in an action by the wife to restrain the use of such confession in said divorce action, that it would be so great an injustice to allow the defendant to use as evidence a confession obtained under such circumstances that a court of equity must interfere.

Held, also, that the wife has such an interest in this confession that she can maintain an action to restrain its use in this way. She has the same interest in this confession that she would have in any letter which might be written by her, and she could maintain an action to restrain the improper publication of any letters which she might have written.

Special Term, May, 1877.

VAN BRUNT, J. — The defendant in this action having obtained from the plaintiff, his wife, by fraud and duress, a confession, in writing, that she had committed adultery, commenced an action against the plaintiff for a divorce upon the ground of adultery. The plaintiff, thereupon, commenced this action to restrain the use of such confession in said divorce action, alleging, among other things, that in case such confession is offered in evidence in a divorce suit she cannot show the fraud and duress by which it was obtained, because the statutes of this State do not permit husband and wife to be examined as witnesses in actions for divorce. The defendant has demurred to this complaint, upon the

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ground that it does not state facts sufficient to constitute a cause of action, and that the plaintiff has not legal capacity to sue.

The point made by the defendant in support of the demurrer is, that no case can be found in which a court of equity—since equitable defenses have been allowed in courts of law—have ever entertained a bill to restrain the introduction of any particular evidence in another action. I feel fully the force of the learned argument presented by the counsel for the defendant in support of the position claimed by him, and my attention has not been called to any case, upon the part of the plaintiff, which establishes the right of the court to entertain this action, but the dismissal of the plaintiff's complaint would enable the defendant to perpetrate so gross an injustice under the guise of the forms of law that it seems to me that any court which would refuse her protection from the frauds which have been practiced upon her (if we are to assume, as true, the allegations of the complaint, and which we must do upon this demurrer) by her husband, the defendant, would cease to be entitled to be called a court of equity. Courts of equity had their origin in the necessity which was felt of giving relief in cases of hardship where it would be refused under the rigorous rules of the law, and, in this case, by the peculiar law of this state, this piece of evidence extorted from her by force and fraud could be used against the plaintiff in the action against her for divorce without her being permitted to show that it was not entitled to be used as evidence against her. It is no answer to this suggestion to say that no divorce could be granted upon the strength of this confession, because it may very well be that this confession when presented to the jury would be the very piece of evidence which would incline the jury to find a verdict against her and which they might never do without it.

As I have said, although no precedent can be found for the maintenance of this action, it would be so great an

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injustice, to allow the defendant to use as evidence a confession obtained under the circumstances stated in the complaint, that a court of equity must interfere.

As to the other point raised, that the plaintiff, being a married woman, cannot maintain the action, it seems to me there is no difficulty in holding that the plaintiff has just such an interest in this confession as she would have in any letter which might be written by her, and it is conceded that she could maintain an action to restrain the improper publication of any letters which she might have written.

I think the demurrer should be overruled, with leave to defendant to answer upon payment of costs.

Musgrave agt. Webster.

SUPREME COURT.

MUSGRAVE agt. WEBSTER.

Demurrer — Answer.

When a defendant demurs to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action, and afterwards answers the complaint, the answer is a waiver of the demurrer.

Special Term, November, 1876.

VAN VORST, J. — It was stated upon the argument, by the plaintiff's counsel, that subsequent to the service of the demurrer, the defendant had answered the complaint. This statement was not denied. The only pleading, on the part of the defendant, is either a demurrer or answer. If a defendant demurs to the entire complaint, upon the ground that it does not state facts sufficient to constitute a cause of action, and afterwards answers the complaint, I should consider the answer to be a waiver of the demurrer, and as evidence of the defendant's intention to raise on the trial of the issue of fact the question as to whether the complaint disclosed a cause of action. By answering he does not waive an objection of that character (*Code*, § 148).

The waiver of the demurrer leaves no issue of law to be determined, and no judgment thereon would be proper.

The hearing is dismissed, but without costs.

Potts agt. Mayer.

N. Y. SUPERIOR COURT.

FREDERICK A. POTTS agt. ISAAC MAYER, impleaded, &c.

Promissory note—bona fide holders for value.

The defendants, H. and M., made their promissory note to their own order for \$1,571.39, and indorsed the same to the defendant K., who, before its maturity, indorsed and delivered it to plaintiff P. The proof showed that M. received value for the note, as it was given in the firm name to H. for money which M. owed to him. H. transferred the note to K. in consideration of \$1,200 balance due K. on a deposit which K. had previously made on account of H. in Detroit. K., who was owing P. at the time on purchases of coal, gave P. the note, who gave him credit for so much cash, and at its maturity, it being protested for non-payment, P. charged the amount back to K., who was liable as indorser, and took it up with his own check; K. has paid nothing to P. on account of the note:

Held, that P. was a *bona fide* holder for value and entitled to recover, and that the case was properly disposed of on the trial, by directing the jury to find a verdict for the plaintiff.

*General Term, May, 1877.**Before SEDGWICK, SPIER and FREEDMAN, JJ.*

THIS is an action brought against Elkin Hyman and Isaac Mayer, as members of the firm of Hyman & Mayer, upon a promissory note for \$1,571.39, made by them to their own order, and indorsed to the defendant Sigmund Kohn, who, before its maturity, indorsed and delivered it to plaintiff for its value.

The court directed a verdict for the plaintiff.

George W. Carpenter, attorney and counsel for defendant.

I. The refusal of the court to allow the defendant's counsel

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to open the case, he having the affirmative of the issue, was error, for which a new trial will be granted (*Lindsley agt. European P. Co.*, 10 *Abb. R.* [*N. S.*], 107; *Millerd agt. Thorn*, 56 *N. Y.*, 402). The answer admitted the *making* of the note by the defendant, *its delivery* to the indorser, also the *indorsement* of Kohn, and the *delivery of it* by him to the plaintiff. Thus all the facts were admitted necessary to plaintiff's recovery. The plaintiff claimed that the indorsement by the makers was not admitted. The admission of its making and delivery was sufficient to obviate a special admission of their indorsement, but a note made and delivered by maker, payable to maker's own order, is deemed in law to be payable to bearer (*Central Bank agt. Lang*, 1 *Bos.*, 205; 6 *ed. R. S.*, vol. 2, p. 1160, sec. 5).

II. The objection as to the admission in evidence of the bills and checks offered by the plaintiff's counsel should have been sustained. The note in suit was received by the plaintiff on the 13th March, 1874, and the bills offered in evidence were receipted March 12, 1874, prior to the time the note was passed to the plaintiff, and there is no evidence to show that they had any connection with or relation to the note in suit. The witness, Potts, did not receive the note, nor sign these receipts; all that he knew was what appeared from the books, which were not kept by him, and what his clerk, Gates, told him. Gates, who received the note, and who was said to have receipted the bills, was not produced as a witness.

III. The court should have submitted to the jury the question whether or not the plaintiff was a *bona fide* holder of the note, for value, and not directed a verdict for the plaintiff. The undisputed evidence showed that the note was without consideration, as between the makers and Kohn, and had been diverted; that it had been passed to the plaintiff and credited to Kohn's general account, and charged back again when protested. (a.) The note was received by the plaintiff on a precedent debt, and the presumption is that it was not received in payment (*Noel agt. Murray*, 13 *N. Y.*, 158; *Buswell*

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agt. *Poinier*, 37 *id.*, 312). Even a receipt is not conclusive that it was received in absolute payment (*Bradford agt. Fox*, 38 *N. Y.*, 289). (b.) A note taken for a precedent debt is subject to all equities between the original parties (*N. Y. Exchange Co. agt. De Wolf*, 3 *Bos. R.*, 86; *Duncan agt. Gosche*, 8 *id.*, 243). (c.) When a note is diverted the onus is upon the holder to show that he is the owner of it in good faith, and for value, and a mere implied extension of time is not a valuable consideration (*Philbrick agt. Dullett*, 2 *Jones & Spencer*, 370; *Lawrence agt. Clark*, 36 *N. Y.*, 128; *Weaver agt. Barden*, 49 *id.*, 286; *Turner agt. Treadway*, 53 *id.*, 650; *Carg agt. White*, 52 *id.*, 138). In the case of *Lewis agt. Rogers* (2 *J. & S.*, 64), relied upon by the respondent, the facts were different. The note there had not been diverted, and it was not given wholly in payment of a precedent debt, but a portion of the goods were sold and delivered at the time of its receipt, constituting a present sale.

IV. The judgment and order appealed from should be reversed, and a new trial ordered.

Richard S. Newcombe, attorney and counsel for plaintiff.

1. The plaintiff was entitled to the affirmative, as under the issue it was necessary for him to prove the indorsement of the note. 2. The exception to the question as to when Hyman paid Mayer money for this note was not well taken, as defendant had previously proved that Hyman had paid Mayer for the note, so that plaintiff was, on cross-examination, clearly entitled to know when. 3. Defendants offer to put in evidence paper to show that Hyman agreed to pay all debts of the partnership, was properly excluded. 4. The check and receipted bills were properly admitted, as tending to show the consideration for the note in suit as between the plaintiff and Kohn. 5. The direction of the court was proper; there was no question for the jury. (a.) So far as Mayer was concerned he had received value for the note—as Hyman proved—having received it from him for so much money.

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(b.) Kohn received it from Hyman in consideration of \$1,200 paid by him for Hyman's account in Detroit, in addition to the \$8,800 he received from defendant Mayer. (c.) Had Kohn been the plaintiff the same direction would have been proper. (d.) But plaintiff as against Kohn, as well as each of the other defendants, was a *bona fide* holder for value—he accepted it on the 12th March, 1874, as so much cash in absolute payment of Kohn's account, and in absolute extinguishment of his debt—took it up, because the latter was liable as indorser at maturity, charged it back to Kohn, but has never received any thing upon account of it (*McGuire agt. Sinclair*, 47 *How.*, 367; *Bright agt. Judson*, 47 *Barb.*, 29; *Burns agt. Rowland*, 40 *id.*, 368; *Traders' Bank agt. Bradner*, 43 *id.*, 379; *Lewis agt. Rogers*, 34 *Sup. Ct. R.*, 64).

6. The judgment should be affirmed, with costs.

SPEIR, J.—The defendant Mayer received value for the note, as shown by his own witness and co-defendant Hyman, who proved that it was given in the firm's name to Hyman for money which the defendant Mayer owed to him. Hyman transferred the note to Kohn in consideration of \$1,200 paid by Kohn for Hyman's account in Detroit.

Prior to this transfer Kohn had deposited in Detroit, on Hyman's account, \$10,000 upon account, of which at that time there was a balance due to Kohn of \$1,200. Under these facts it is clear enough that had Kohn been the plaintiff, holding this note as prosecutor, the court must have made the same disposition of the case as on this trial.

The plaintiff's title differs in no material respect from that of Kohn. He received the note from him and gave him credit, so much cash, and at the maturity of the note it was protested for non-payment, and the plaintiff charged the amount back to Kohn, who was liable as indorser, and took it up with his own check. Kohn has paid nothing to the plaintiff on account of the note.

The judgment must be affirmed with costs.

Shiffer agt. Dietz.

N. Y. SUPREME COURT.

SAMUEL S. SHIFFER agt. JOHN G. DIETZ.

Rescission of contract — Fraudulent suppression of fact — When purchaser may rescind — Executor's power of sale — Tender.

A contract for the purchase of real estate, which contract required the seller to give a perfect title, in fee simple, free from all incumbrances, may be rescinded where, at the time of the execution of the contract by the seller and the delivery of the deed thereunder, he fraudulently suppressed a fact which rendered the title imperfect.

Where a party has, by the fraudulent suppression of the existence of incumbrances, induced another to take the title to property, the purchaser is not bound to wait an unreasonable time in order to give the seller an opportunity to remove those incumbrances before he can rescind.

Where any executor neglects to take upon himself the execution of a will, any power of sale contained in the will may be executed by the executor or executors who shall take upon themselves the execution of such will.

About November, 1873, the plaintiff conveyed a part of the premises in question to Raynor & Morris, who were copartners with him in his purchase. On the 20th of April, 1876, the executors of Raynor and Morris, they having died, reconveyed this portion to plaintiff, and on the 25th of April, 1876, this action was commenced; on the 5th of May, 1876, the plaintiff made a general assignment; on the sixth of November the defendant tendered a deed, executed by himself and wife, to the plaintiff. The contract of sale which the plaintiff, by this action, seeks to rescind, was executed in March, 1873:

Held, that the plaintiff did not lose his right to rescind by his delay in making the rescission, as such delay was caused solely by the representations of the defendant that he would make the title all right.

Held, also, that the conveyance to Raynor and Morris could not deprive these parties of the right of rescission, because such conveyance simply put the legal title where, in equity, it belonged.

Held, further, that the conveyances to plaintiff vested in him the whole title to the property, and his deed tendered to the defendant was, therefore, sufficient.

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The subsequent assignment of the plaintiff could not change the status of the parties, which had become fixed on the 25th of April, 1876.

Special Term, March, 1877.

VAN BRUNT, J. — Every principle of equity demands that the plaintiff should be decreed the relief sought in this action, unless some plain principles of law must be violated in the granting of such relief.

This action is brought to rescind a contract for the purchase of real estate, which contract required the seller to give a perfect title, in fee simple, free from all incumbrances upon the ground, that at the time of the execution of this contract by the defendant, and the delivery of the deed thereunder, he fraudulently suppressed the fact of his having a wife living, whose release of dower was necessary to convey to the plaintiff a perfect title

The evidence seems to establish the fraudulent suppression of this fact beyond all question. The plaintiff, prior to October, 1869, had well known the defendant and knew that he was a married man. He also knew that in October, 1869, the defendant's wife died. In September, 1871, the defendant was secretly married to one Harriet Dietz. In the fall of that year the defendant spoke to the plaintiff of the loss of his wife, and about his feeling low-spirited in consequence thereof. At or about the time of making the contract for the sale of this property, in March, 1872, the defendant told the plaintiff that he sold the property because he wanted to go to Europe, as he had lost his wife a year or so before and felt melancholy. Each of these statements about the loss of his wife and the melancholy condition of his feelings was made after his marriage with Harriet Dietz. It appears from the evidence that inquiries were made of the family of Mr. Dietz as to whether he was married or not, by the counsel for the plaintiff, and he was informed that he was not.

The defendant well knew that if the plaintiff had known of this second marriage at the time of the entry into the con-

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tract and the taking of the deed, he would not have accepted the title without the release of dower of the second wife. There is not the slightest pretense that he did not know this fact, but he attempts to excuse himself for this fraudulent suppression by asserting that he didn't suppose his second marriage was valid, because he believed at the time he married her that she had a husband living.

In the fall of 1872 the defendant seems to have realized the fact that the first husband of his second wife was an individual whose existence it was impossible to prove, and that there was no such way to avoid his marriage as he had supposed. In March, 1873, he commenced a suit for divorce against his wife on the ground of adultery. In the summer of that year the plaintiff first learned that any person claimed to be the wife of Dietz. About November, 1873, the defendant called upon the plaintiff for interest upon the mortgages, when the plaintiff told Dietz of the defect in the title. His reply was that a woman was attempting to blackmail him, and he would have it settled in a very short time, and before the next interest fell due he would have it all arranged, and relying upon these representations of the defendant, the plaintiff paid the interest then due. The plaintiff conveyed, about this time, a part of the premises to Raynor and Morris, who were copartners with him in his purchase.

The defendant repeatedly told the plaintiff, during the progress of the divorce suit, that if he could not make the title good he would return the money, evidently expecting to perfect the title by a decree favorable to himself in the divorce case. Finally, in July, 1874, a decree of divorce was refused to the plaintiff, they both having been convicted of adultery. Then the defendant's attorney having conceived the idea that his wife, having been convicted of adultery, was no longer entitled to dower in his estate, at his own expense had a case carried to the court of appeals for the purpose of testing this question. In January, 1876, that case was decided against the theory of defendant's counsel.

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On the 20th of April, 1876, the executors of Raynor and Morris, they having died, reconveyed the portions of the premises conveyed to Raynor and Morris to the plaintiff, and on the 25th of April, 1876, this action was commenced, and on the 5th of May, 1876, the plaintiff made a general assignment to one Jacobs. On the 1st of November, 1876, the defendant tendered a deed, executed by his wife and self, to the plaintiff.

It is claimed by the defendant that the plaintiff lost his right to rescind by his delay in making the rescission, and by the fact of his having conveyed interests in the property to Raynor and Morris.

It is perfectly clear from the evidence in the case that the plaintiff's delay in making his rescission was caused solely by the representations of the defendant that he would make the title all right, as he expected to do at first by the divorce suit, and after his expectations in that regard had been defeated, as he hoped to do by a favorable decision in the case carried to the court of appeals. I can see no reason why the plaintiff should have been required, after having thus long waited for the defendant to perfect this title, to suffer any further delay. It certainly could not have been expected that he should have waited nearly another year after the decision in the court of appeals to enable the defendant to perfect his title.

The case of *Meyer agt. DeMier* (52 N. Y., 647) is no authority for the proposition that where a party has, by the fraudulent suppression of evidence of the existence of incumbrances, induced another to take the title to the property, that before the purchaser can rescind he must give the seller a reasonable opportunity to remove those incumbrances.

The conveyance to Raynor and Morris could not deprive these parties of the right of rescission, because such conveyances simply put the legal title where, in equity, it belonged.

By the wills of both Raynor and Morris the executors, the survivor or survivors of them, were empowered to convey any portion of the real estate.

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It appears, from the certificate of the surrogate, offered in evidence, that of the executors named in Raynor's will, Sarah E. was the only one that qualified; and that of the executors named in the will of Peter Morris, John H. Morris alone qualified, and the deeds to Schiffer were executed by these sole acting executors. The Revised Statutes (*second volume*, 109, *section* 55), expressly provides that where any executor neglects to take upon himself the execution of a will, any power of sale contained in the will may be executed by the executor or executors who shall take upon themselves the execution of such will. The conveyances, therefore, to Schiffer vested in him the whole title to the property, and the plaintiff's deed tendered to the defendant was, therefore, sufficient.

As to the question of the possession of the plaintiff, it is apparent that it was understood that in case the tender of the plaintiff was accepted, possession of the premises was at the defendant's disposal. The subsequent assignment of the plaintiff could not change the status of the parties, which had become fixed on the 25th of April, 1876.

There should be a reference to determine the amounts which the plaintiff has realized from the property, and the amounts which he has paid out thereon, and for the balance he should have judgment against the defendant, and also a judgment cancelling the bonds and mortgages given for part of the purchase-money, with costs.

Matter of Herman.

N. Y. COMMON PLEAS.

In the matter of the assignment of ABRAHAM S. HERMAN to
DAVID FORCHHEIMER.

Assignee — Citation by creditor to account — Answer — Bankruptcy — Composition.

There is no power to deprive a creditor of the right to demand and insist upon an account being rendered by an assignee under the state law.

The answer of the assignee that after the assignment a petition had been filed in bankruptcy, and a composition effected by the assignor, whereupon he surrendered to them the assigned estate, presents no reason why he should not be required to render his account.

The creditors, by virtue of the assignment and its acceptance by the assignee, acquired certain vested rights in the assigned estate, of which they could not be divested by the bankruptcy proceedings.

They could only be divested of these rights either by a bill in equity, or by their consent in the resolution of the creditors accepting the composition that the assigned estate should be returned to the assignor.

Although the petitioning creditors presented their claims and proofs of claims before the register in bankruptcy, and appeared during the examination and proceeding before the register, the right to an accounting is not affected thereby.

Special Term, March, 1877.

*To the honorable the judges of the court of common pleas
of the city and county of New York :*

THE petition of Robert W. Aborn, James Moir and Edward Baldwin, composing the firm of Aborn, Moir & Co., of the city of New York, respectfully shows :

That they are residents of the city and county of New York, and creditors of Abraham S. Herman to the amount of \$1,759.88, for merchandise by your said petitioners sold and delivered to the said Abraham S. Herman, between and

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including the 18th day of May and the 22d day of July, 1875, none of which has been paid.

That on the 5th day of October, 1875, said Abraham S. Herman executed and delivered to David Forchheimer an assignment for the benefit of his creditors, which assignment was, on the 5th day of November, 1875, duly filed in the office of the clerk of the city and county of New York, and to which said assignment your petitioners crave leave to refer.

That the said Forchheimer accepted said assignment, and the trusts created thereunder, and received into his possession, under said assignment, personal property exceeding in value the sum of \$5,000, as your petitioners are informed and verily believe.

That the said David Forchheimer has not filed an account as such assignee, as required by the State, although more than one year has elapsed since such assignment and the filing thereof, and no inventory of the assets of the said Abraham S. Herman has been filed.

Wherefore your petitioners pray that a citation or summons be issued out of and under the seal of this court, directing the said David Forchheimer forthwith to appear before the court, or any judge thereof, and show cause why an account of the trust fund created by said assignment should not be made, why the claim of your petitioners should not be paid, and why such other proceedings should not be had in the premises as may seem proper.

ROBERT W. ABORN,
ABORN, MOIR & CO.,

by R. W. ABORN, in liq'n.

Petitioners.

RICH'D S. NEWCOMBE,

Attorney for Petitioner, 258 Broadway, N. Y.

CITY AND COUNTY OF NEW YORK, ss.:

Robert W. Aborn, being duly sworn, says that he has read the foregoing petition, and knows the contents thereof; that

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the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

ABORN, MOIR & CO.,

by R. W. ABORN, in liq'n

Sworn to before me, }
January 16, 1877. }

JAMES TAYLOR,

Notary Public, N. Y. Co.

To DAVID FORCHHEIMER:

You are hereby cited, summoned and required personally to appear before me, the undersigned, or one of the judges of the court of common pleas in and for the city and county of New York, at a special term to be held at chambers thereof, at the county court-house, in the city of New York, on the 26th day of January, 1877, at half past ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, and show cause why an account of the trust fund created by the assignment made to you by Abraham S. Herman of all his estate, &c., for the benefit of his creditors, and dated on the 5th day of October, 1875, should not be had, why such assignee should not pay the claim of the petitioner, and why such other or further proceedings should not be had as may seem proper.

Dated New York, 16th January, 1877.

GEORGE M. VAN HOESEN,

Judge Common Pleas.

The assignee under the state law appeared by A. J. Dittenhoefer, and answered by stating that after the assignment a petition had been filed in bankruptcy and composition effected by the assignor, whereupon the assignee surrendered to them the assigned estate.

Richard S. Newcombe, of counsel for petition creditors, answered as follows:

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This is a citation by creditors to the assignee under the state law to render his account as assignee, to which a creditor is entitled as of course, and *there is no power* to deprive the creditor of *the right to demand and insist* upon an account being rendered. The assignee, by the assignment, *accepted and agreed to perform certain trusts*, and the creditors, as they have a right to, demand now, an account of his stewardship. *Perhaps*, upon an accounting being had, the court will allow the assignee to prove that he delivered over the assigned estate to the assignor, with the approval of the United States court, but as yet there is no evidence that he did, nor would it be proper until his account was being examined. But the creditors, by virtue of the assignment and its acceptance by the assignee, acquired certain *vested rights* in the assigned estate, of which they cannot be divested by the action of the United States court in the proceedings stated. They could only have been divested of these rights either by a bill in equity, or by their consent in the resolution of the creditors accepting the composition that the assigned estate should be returned to the assignor; no evidence of either is offered, nor were such the facts. There is nothing to talk about; the creditors are entitled to an accounting; and the fact stated in the *assignor's* affidavit, that the petitioning creditors presented their claims and proofs of claims before the register in bankruptcy, and appeared during the examination and proceeding before the register, does not affect our position, nor would it even although it was charged that we proved our claim (which would be materially different to the statement made), nor if we *participated* in the proceedings before the register, instead of "*appeared during the examination*" (*Re Rosenberg*, 2 *Bank. Reg.*, 81; *Re Robinson*, 2 *Nat. Bank Reg.*, 108). The creditors are clearly entitled to have an account rendered by this assignee of what property came into his hands under the assignment in question, and what he did with it, and upon that account being rendered

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by him will arise the question whether or not he is liable to the unsatisfied creditors of the assignor.

Dated NEW YORK, *March* 1, 1877.

At the close of the arguments, *LARREMORE, J.*, made the following order:

Upon reading and filing the petition of Robert W. Aborn and others, composing the firm of Aborn, Moir & Co., order to show cause and citation to said David Forchheimer to show cause why the prayer of said petition should not be granted, and the affidavit of Abraham S. Herman in opposition thereto, and after hearing Richard S. Newcombe, of counsel for the petitioners, in support thereof, and Abraham J. Dittenhoefer, Esq., of counsel for the opposition thereto,

Now, on motion of Richard S. Newcombe, attorney for the said petitioners, it is ordered that the said David Forchheimer, within five days from the service of a copy of this order upon his attorneys, file his account as assignee of the estate of Abraham S. Herman.

Eno agt. The Mayor, &c.

N. Y. SUPREME COURT.

AMOS R. ENO agt. THE MAYOR, &c.

Contract — Bond — Sureties — want of publication — Assessment — action to restrain its collection.

A resolution of the common council of the city of New York, authorizing work to be done, is required to be published in the corporation papers, and the want of publication is fatal to a contract.

The legislature cannot by an *ex post facto* law make a party liable for damages for the failure to perform a contract which at the time of its breach was void.

Where the contractor abandoned his contract in 1871, and the legislation validating the contracts took place subsequent to that time, the rights of the sureties on the bond of the contractor had become fixed and could not be affected thereby.

The municipal authorities of the city of New York are the agents of the property owners, and a bond of a contractor taken for the faithful performance of his contract is taken for their benefit, and in case of the non-fulfillment of the contract the bond should be collected, and the amount thereof applied in diminution of the assessment.

An action may be maintained by a property owner to restrain the corporation of the city of New York from collecting an assessment without crediting him with the proportionate amount of a bond given by a contractor for the faithful performance of his contract, and which he failed to perform, the work under which being done by a subsequent contractor at a much higher rate.

Special Term, May, 1877.

VAN BRUNT, J. — This is an action to restrain the defendants from collecting an assessment without crediting him with the proportionate amount of a bond given by a contractor for the faithful performance of his contract, and which he failed to perform, the work under which being done by a subsequent contractor at a much higher rate.

Eno agt. The Mayor, &c.

Upon a demurrer to the complaint in this action the court of appeals held that the action could be maintained, and in considering the opinion of the court of appeals it is necessary to remember that the demurrer admitted the contract with Moore to be valid, and that the defendants had a cause of action against the sureties upon his bond for his failure to perform his contract, which they refused to enforce.

The court held that the municipal authorities were the agents of the property owners; that the bond was taken for their benefit, and it should have been collected and the amount thereof applied in diminution of the assessment. In the case now, however, the defendants claim to have shown that the resolution authorizing the work never having been published according to law, the contract was void, and the sureties upon the bond could not have been held for the failure of the contractor to perform his contract.

It is clear that if the contractor had no claim against the defendants because of the want of publication of the resolution, authorizing the work, the contract was void as to both parties, and neither could be held under it.

It has been repeatedly held that the want of publication, as required by law, was fatal to a contract.

It is claimed that the court of appeals have held, in the *Matter of Burke* (62 N. Y., 225), that there was no necessity for the publication of the resolution in the New York Leader, in the year 1868. I am unable to find any such decision in the opinion rendered in that case. The court did decide that the designation of the New York Leader, as a corporation paper, in 1867, was limited to the year 1867 only. It was further held that the proceedings of the common council, which, in that case, were claimed to be invalid for want of publication, were had in 1868, and that it *did* not appear that they were not published in the papers employed in that year, nor that a new designation of the Leader had been made in 1868. It was further held, that in the absence of proof that no designation of papers had been made, it was not to be presumed

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that the authorized officers had failed to make a designation of some papers as required by law.

In the case now at bar, it is expressly proven that such failure had been made, bringing it clearly within the cases out of which the want of that evidence, the court says, took the case of *Burke*. In the opinion of the court, rendered in this case upon the demurrer, the court held that it was the duty of the defendants to prosecute this bond; but it now appearing that the defendants having no cause of action upon the bond, clearly no duty devolves upon them to attempt to prosecute it.

But, it is claimed upon the part of the plaintiff, that even if the contract was originally void, it was validated by subsequent action of the legislature. It was somewhat difficult to see how the legislature could, by any *ex post facto* law, make a party liable for damages for the failure to perform a contract which, at the time of its breach, was void. The most that the courts have held, is that the legislature by its action has ratified the contracts made by the defendants, and that the contractor, if he has fulfilled his part of the contract, can compel the defendants to perform theirs, notwithstanding its invalidity. The contractor, Moore, abandoned his contract in June, 1871, and it was subsequent to that time that the legislation validating the contracts took place, and clearly could not affect rights which had then already become fixed.

As to the claim of the plaintiffs, that Moore was estopped from claiming that the contract was invalid, it is only necessary to say that, as it is certain that Moore could not have recovered any thing against the city, the city could not hold him to his contract. The plaintiffs further claim that they are entitled to have some deduction made for the \$10,000 paid for work done upon the Moore contract. It seems to me that the acts of the legislature of the years 1872 and 1874 expressly authorize the inclusion in the assessment of any amount paid out for work done under these contracts.

The defendants are entitled to judgment, with costs.

Gale agt. New York Central and Hudson River R. R. Co.

SUPREME COURT.

ISAAC G. GALE agt. THE NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY.

Action for a personal injury — New trial — Excessive damages — Newly-discovered evidence — Misconduct of a juror — Waiver — Costs.

In actions for *personal injuries* the court will not grant a new trial on the ground of *excessive damages*, unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from passion, prejudice, partiality or corruption.

It is not enough to say that, in the opinion of the court, the damages are too high, and that it would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for *personal torts or injuries*.

Although there are cases in which the court has sometimes *reduced verdicts* where the damages were excessive; it would seem to be a doubtful practice in actions for personal injuries. A jury, and a jury only, under the laws of our state, unless otherwise agreed upon by the parties, is the body to whom the duty of assessing damages in actions of this character is confided, and the law which enables a judge to fix and limit a recovery *after verdict* would seem to apply equally as well to a case *before verdict*.

The better practice would seem to be, where the verdict is so excessive as to justify the conclusion that it is the result of partiality, prejudice or corruption, to set it aside and order a new trial, and thus allow a new jury to assess the damages.

A new trial will not be granted on the ground of *newly-discovered evidence* where the evidence claimed to be newly discovered is cumulative, evidence of a similar character having been introduced upon the trial.

The alleged declarations of jurors as to the grounds of their verdict, cannot be received to impeach it. The affidavits of the jurors themselves could not be received for that purpose, and much less their unsworn statements made to a third person.

If the prevailing party to an action, with a view of influencing a juror by placing him under obligations to him, seeks and obtains an opportunity

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so to do, a new trial will be granted. In such case the court could see that an effort had been made to improperly influence, and it would not stop to inquire whether the attempt had or had not been successful, but would assume that the party had, at least, partly succeeded in that which he had attempted.

When, however, the court is satisfied that there has been no attempt by the successful party to unduly influence a juror, either by conversation or by placing him under obligations, and that his action has not in fact been improperly influenced, then, even though the act may have been indiscreet, the court will not disturb the verdict.

On a Friday during the progress of the trial, the jury having been discharged till the following Monday, one of the jurors, being about twelve miles from home and having failed to obtain any other equally comfortable opportunity to reach his residence, asked the plaintiff, who had to go for a number of miles in the same direction, for permission to ride with him. To this the plaintiff consented. It was abundantly shown that nothing whatever concerning the cause upon trial was spoken of or discussed, nor were any words exchanged between the juror and the plaintiff, except when the juror left the sleigh, at the point where their routes homewards diverged, the juror thanked the plaintiff for kindness. Before the close of the trial the juror reported what he had done to the court, and the fact was known to the defendant's counsel, who made no objection to the juror for this reason. On motion to set aside the verdict for this cause:

Held, that the act done was not an officious one thrust by the prevailing party upon the juror for the purpose of procuring his good will and thus influencing action, but it was the result of neighborly courtesy and kindness, without any evil intent whatever, and is no ground for disturbing the verdict.

Held, also, that the fact that the juror rode home with the plaintiff being known to the defendant's counsel before the close of the trial, whilst the defendant would not, perhaps, be precluded from raising any objection founded upon any improper attempt to influence, which was then unknown, yet the objection, based upon the mere ride with the plaintiff, because not then made, must be deemed to have been waived.

An allowance to the plaintiff of two and one-half per cent for costs on the verdict of \$14,000 deemed sufficient under the circumstances of the case.

Albany Circuit and Special Term, May, 1877.

MOTION by defendant for a new trial on a case with exceptions, and also upon affidavits relating to alleged newly-discovered evidence, and misconduct of a juror.

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Matthew Hale, for defendant and the motion.

Parker & Countryman, for plaintiff and opposed.

WESTBROOK, J.—This cause was tried at the January, 1877, Albany circuit, before the judge giving this opinion, and resulted in a verdict in favor of the plaintiff for the sum of \$14,000. The facts of the case were these: On the 8th day of July, 1873, the plaintiff was driving a pair of horses to a wagon laden with pressed hay from his home in Westerlo, Albany county, to Coeymans Landing. The distance between the two points was thirteen and a half miles. The road which the plaintiff traveled was known as the Coeymans and Westerlo turnpike, and its general direction was east and west. About one or two miles from Coeymans Landing, the Athens and Schenectady branch of the defendant's railroad, the general direction of which is north-westerly and south-easterly, crosses the said turnpike road, and in passing over the railroad track, in consequence solely, as the plaintiff claimed and as the jury must have found, of the railroad crossing being rough and out of repair, the wagon of the plaintiff broke down, causing him to fall so heavily as to break his right leg near the hip. The plaintiff was confined constantly to his bed until the first of October following, and his injured limb is now shortened one and a half inches, compelling him to use two crutches, and permanently incapacitating him for general labor. At the time of the injury the plaintiff was forty-five years of age, an unusually healthy and vigorous man, and had been and still is (so far as his disabled condition allows) an industrious and intelligent farmer.

The questions of fact which the case involves, were, as we think, after a careful reading of the charge, impartially and without any coloring submitted to the jury, and the result was the verdict above stated. Upon the subject of damages the jury were charged: "If you come to the question of

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damages, then you will see that the injury was a serious one. The right leg was broken near the hip; he was confined to his house for several months, and the injury is probably incurable. Your damages should be by way of compensation—you are not to punish, but compensate—you are to make the plaintiff good and whole in dollars and cents for the loss he received by the negligence of the defendant, if you find for the plaintiff. For the remainder of his life he will be unable to labor as he has done in times that are past; and there is the bill of the physician, sixty-seven dollars and twenty-five cents. You can add also, by way of compensation, redress for the pain and inconvenience he suffered during the three months he was confined to his bed and house; you can compensate him for the pain and inconvenience he may suffer during the remainder of his life, if you find the injury will be permanent, and that plaintiff should recover; you are to measure out damages upon the principles of absolute justice and right. In this court-room we administer justice, not according to who the parties are, but according to the right and truth in every case. We have not a scale in which we weigh railroad cases, another in which to weigh other cases. We endeavor, as God gives us light, to weigh each case fairly and impartially; and you are to render such a judgment as will be approved by your own consciences and by Him who knows all hearts." This portion of the charge is given in full, because, in considering the first point made by the defendant, upon its motion for a new trial—the alleged excessiveness of the verdict awarded—it is important to see if any thing was said to the jury upon the subject of damages calculated to mislead, or to excite. Assuming that nothing which could have had such an effect was said, this ground for a new trial will now be considered.

In discussing the point, the remarks of KENT, C. J., in *Coleman agt. Southwick* (9 *Johnson*, 45), which has often been approved (*see, among other cases, Collins agt. The A. and S. R. R. Co.*, 12 *Barbour*, 496), should be borne in

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mind: "The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot, consistently with the precedents, interfere with the verdict. It is not enough to say that, in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries." Applying these principles to the case before us, let us see what elements of damages the jury had to consider: First. The actual loss in dollars and cents to a man of forty-five, before that in full health and vigor, who is rendered unfit for general labor. How many years of active and profitable personal toil remained to him, and what would that toil and labor have been worth to him each year, if the wrongful and negligent act of the defendant had not deprived him thereof? Second. The pain and shock of the fall and fracture continued acutely during the months he was confined to his bed, with his limb drawn down with a strap so as to prevent its contraction, and also continued with more or less violence to the present time. Third. The pain and inconvenience which he must endure during the remainder of his life, every physical step in which is an inconvenience and a reminder of what he once was, and of his present actual condition; and, fourth. The cost of medical and other attendance during the time of his actual confinement to his bed and to his house.

It will readily be seen that the case afforded the jury a wide range of thought, and of calculation. The main items of damages are these in regard to which the minds of men could readily differ. A sound leg has no particular market value, nor is the standard by which the damages caused by physical pain and suffering are to be measured to be found in

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any commercial or legal table. They are to be estimated by the honest judgments of independent jurors, and with that judgment no court can interfere, unless it be so palpably and manifestly outrageous "as to strike every one with the enormity and injustice thereof." The occupation of a farmer, if pursued, as this plaintiff pursued it, as a means of livelihood, and doing the most of his own work, requires not only intelligence, but full bodily strength and the perfect use of every limb as well. At the age of forty-five, it is not unreasonable to suppose that there remained to the plaintiff twenty years, at least, of active, personal labor. Joined with his intelligence and former physical strength, and quickened, as a hired man cannot be, by self-interest, the value of the plaintiff's labor to himself during so many years must have been very great, and of that value who so competent to judge as a jury, composed, as this was, of farmers pursuing their avocations in the same locality? If twelve men of this character had, upon their oaths, unanimously fixed the loss in dollars and cents which the plaintiff has sustained, from incapacity to labor as formerly, at the amount of the verdict, would the result have been such an "enormity" as to authorize the court to brand them as prejudiced, partial or corrupt? The exquisite pain and torture of a fractured limb drawn and strapped for a period of nearly three months, intensified by the unchanging and fixed position of the body during those days and nights of weariness—the pain and inconvenience of succeeding years—the mental suffering resulting from a consciousness of a wrecked and broken body, how are these to be valued, and when valued by a legal tribunal, presumed to be honest, intelligent and impartial, where so much is committed to discretion and good judgment, by what rule is a court to pronounce that valuation so grossly flagrant, as by its deliberate opinion to pronounce the jury forgetful of duty and insensible to claims of right? It is immaterial, if the question had been left to it, at what figures the court would have assessed the damages of this plaintiff. Actual loss and

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injury, to a very considerable amount, are apparent. With the data, which the cause affords, a very wide latitude and discretion were committed to the jurors, and after careful consideration we are unable to see how, within the rule for our guidance heretofore given, the verdict can be disturbed upon this ground.

We are aware that cases can be found in which the court has sometimes set aside and sometimes reduced verdicts. Upon what principle the latter has been done has never been very apparent. If the court reduces a verdict, what does it do which differs from an assessment by it of the damages in the action? A jury, and a jury only, under the laws of our state, unless otherwise agreed upon by the parties, is the body to whom that duty is confided, and the law which enables a judge to fix and limit a recovery after verdict would, as it seems to me, apply equally as well to a case before verdict. In either, the court, and not the jury, assess the damages, and upon what principle it may do so, is not to my mind clear. If the verdict is so excessive as to justify the conclusion that it is the result of partiality, prejudice or corruption, it should be set aside, and a new jury should, in my opinion, assess the damages. When there is no assessment by a jury (for a pretended one founded not upon an honest ascertainment and computation of loss, but resulting from spite or malice against the defendant, or from a desire to favor the plaintiff, is none in fact) the court ought not to ascertain and declare a result, the right to do which has been wisely committed to another body. Without formally deciding that the judiciary is without power to reduce the amount of a verdict in an action for a personal injury, a conclusion which is against precedents established by wise and upright judges, still for the reasons indicated, the exercise of such a power, which must depend upon discretion, would not now be assumed if the conclusion, as declared by the jury, could not be upheld.

It was strenuously argued by the learned counsel for the

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defendant, that in no recorded case have damages as large as were awarded in this been given. The aim of this opinion has thus far been to show, not what verdicts have been sustained, and what disturbed, but what must be the result of the application upon this ground, assuming a well understood and defined rule for our guidance. Every case differs from its predecessor, and very rarely will two minds appraise the damages resulting from a personal injury at the same figures. There is, in every such case, great room for difference of opinion, and any person may well pause and shrink from saying, when a cause like this is before him, that the judgment which opposes his own is biased or corrupt. The following cases, however, in which large recoveries have been sustained, can be found: *Sloan agt. New York Central and Hudson River Railroad Company* (1 *Hun*, 540; 45 *N. Y.*, 125); *Hageman agt. Western Railroad Company* (16 *Barbour*, 353); *Ransom agt. New York and Erie Railroad Company* (15 *N. Y.*, 415); *Shaw agt. Boston and Worcester Railroad Company* (8 *Gray*, 46); *Laning agt. New York Central Railroad Company* (49 *N. Y.*, 525); *Saunders agt. The London and North Western Railway Company* (98 *Eng. Com. Law*, 889); *Filer agt. New York Central Railroad Company* (49 *N. Y.*, 42; see error books in state library for amount of verdict); *Downs agt. New York Central Railroad Company* (47 *N. Y.*, 83; see error book on second trial, state library, and 56 *N. Y.*, 664).

The result, then, of our examination is, that both on reason and precedent the application for a new trial, upon the ground of the excessiveness of the damages, must be denied.

The defendant, however, also claims that a new trial should be granted, because, since the one which was had, he has found a witness who was present at the accident who will testify that the plaintiff did not cross the defendant's railroad at the regular crossing, but to the south thereof. Evidence of the same character was given upon the former trial, and this would, therefore, be cumulative. For this reason, so

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well-settled as not to call for authority, and without any examination of the impeaching and contradicting evidence produced by the plaintiff, a new trial upon this ground must also be refused.

The alleged declarations of jurors as to the grounds of their verdict, of course, cannot be received to impeach it. The affidavits of the jurors themselves could not be received for that purpose, and much less their unsworn statements made to a third person. Verdicts can never be made dependent upon the foolish or wicked after-statements of jurors in regard thereto. If such a rule should be adopted, it is apparent that no verdict could stand. It is due, however, to the jurors in this cause to state that their affidavits satisfy me that no statements were made by them of the character which the defendant claims.

The alleged misconduct of one of the jurors remains to be considered. On the second day of February last, this cause being on trial, and the jury having been discharged until the following Monday (February fifth), Thaddeus Pomeroy, one of the jurors, being about twelve miles from home, and having failed to obtain any other equally comfortable opportunity to reach his residence, asked the plaintiff, who had to go for a number of miles in the same direction, for permission to ride with him. To this the plaintiff consented. The sleigh had three seats, and the juror sat upon the back seat with Mr. Luman Stanton, one of plaintiff's witnesses. The plaintiff sat upon the front seat, and it is abundantly shown that nothing whatever concerning the cause upon trial was spoken of or discussed, nor were any words exchanged between the juror and the plaintiff, except when the juror left the sleigh at the point where their routes homeward diverged, the juror thanked the plaintiff for kindness. Before the close of the trial, the juror reported what he had done to the court, and the fact was known to the defendant's counsel, who made no objection to the juror for this reason. It is now, however, claimed that the verdict should be set aside for this cause.

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If the plaintiff, with a view of influencing the juror by placing him under obligations to him, had sought this opportunity so to do, a new trial would be granted. In such a case the court could see that an attempt had been made to improperly influence, and it would not stop to inquire whether the wicked effort had or had not been successful, but would assume that the party had, at least, partly succeeded in that which he attempted. The following cases turned on this ground, or upon reasons analogous in principle, to wit, the intent of the party: *Walker* agt. *Walker* (10 *Georgia*, 203); *Walton* agt. *Hunter* (17 *id.*, 364); *Oberon* agt. *Mader* (40 *Iowa*, 662); *McDaniels* agt. *McDaniels* (40 *Vermont*, 363); *Ritchie* agt. *Holbrook* (7 *Sergt. & Rawle*, 458); *Philipsburgh Bank* agt. *Fulmer* (31 *N. J. R.*, 53); *Cottle* agt. *Cottle* (6 *Greenleaf*, 140); *Knight* agt. *Freeport* (13 *Mass.*, 218); *Nesmith* agt. *Clinton Fire Insurance Company* (8 *Abbott*, 141).

When, however, the court is satisfied that there has been no attempt by the successful party to unduly influence a juror, either by conversation, or by placing him under obligations, and that his action has not in fact been improperly influenced, then, even though the act may have been indiscreet, the court will not disturb the verdict.

Hilton agt. *Southwick* (17 *Maine*, 303) fully covers, and more than covers the case before us. On a Saturday afternoon, after the trial had been commenced, one of the jurors rode home with the plaintiff, who was the prevailing party, in his wagon. "It also appeared, that the same juror before the cause came on for trial, during the term, went home with the son of the plaintiff, who was a witness, and stayed over night with him." Notwithstanding these facts, the court being satisfied that no attempt had been made to influence the juror, improperly refused to interfere. The court distinguished that case from *Cottle* agt. *Cottle* (6 *Greenl.*, 140), by stating that while in the one just referred to, it appeared that the hospitality extended to the juror was "done not as

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an act of ordinary and neighborly kindness," yet in the case before it "although under the circumstances indiscreet and incorrect, it does appear to have been of *that* character."

The principle upon which the verdict in *Hilton agt. Southwick* was sustained — that the act done was not an officious one thrust by the prevailing party upon the juror for the purpose of procuring his good will, and thus influencing action, but it was the result of neighborly courtesy and kindness, without any evil intent whatever, is not only sound in reason, but it and similar reasons have frequently guided and controlled the judgments of courts. A detailed examination of the cases will unnecessarily lengthen this opinion, and a simple reference to them is only made (*See Hadley agt. Cole*, 30 *Maine*, 9; *Martin agt. Mitchel*, 28 *Georgia*, 382; *Shea agt. Lawrence*, 1 *Allen*, 167; *White agt. Wood*, 8 *Cushing*, 413; *Jones agt. Vail*, 30 *N. J.*, 135; *Eakin agt. Morris Canal and Banking Co.*, 24 *id.*, 538; *Sexton agt. Selieverre*, 4 *Cole*, 11; *Morris agt. Vivian*, 10 *Mees. & Welsby*, 137).

The fact that the juror rode home with the plaintiff was also known to the counsel for the defendant before the close of the trial, and whilst the defendant would not, perhaps, be precluded from raising any objection founded upon an improper attempt to influence, which was then unknown, yet the objection based upon the mere ride with the plaintiff, because not then made, must be deemed to have been waived (*Fessenden agt. Sager*, 53 *Maine*, 531; *State agt. Daniels*, 44 *N. H.*, 383; *Fox agt. Hazelton*, 15 *Pick.*, 375; *Hallock agt. Franklin*, 2 *Met.* 560; *Martin agt. Sidwell*, 36 *Georgia*, 332).

Before closing this opinion, so far as it disposes of the motion for a new trial, it is proper to state that the jury in this cause was selected with great care, each one being carefully examined. Their answers and appearance showed them to be men of more than average character and intelligence. Nothing occurred upon the trial to cause the court to suspect their impartiality. When such a jury, after a careful hearing

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and deliberation, has reached and announced a conclusion in a cause, in which very much is confided to their sound judgment and wise discretion, a judge ought to hesitate in pronouncing a verdict thus rendered to have been influenced by excitement, partiality, or corruption. Cases have arisen, and will continue to arise, where judges and jurors may widely differ in actions for personal injuries, as to the amount which ought to be awarded therefor, but such difference of judgment, in causes where there is great scope for diverging views, should not necessarily incline the former to think that their estimates are so much better than those of men to whom the law has confided the duty to ascertain them, as to enable them to say that the latter have been biased and impartial. That a case may arise in which the court should so hold, is probable. The judge, before trial is had, will generally, in such a case, see something in the conduct of jurors to justify such a conclusion. Nothing of this sort, as has already been said, appeared upon this trial; and looking at the facts of this case, though the verdict may seem large, the court can see that the conclusion reached may have been the result of a careful and impartial calculation of the pecuniary loss and injury which the plaintiff has sustained.

A single question remains to be disposed of, and that is, the allowance to the plaintiff for costs. Without formally deciding that the verdict is an unusually large one, it is apparent that the amount thereof will reasonably indemnify the plaintiff for his costs and expenses in seeking redress. It is also true, however, that the trial of this cause, as well as the resistance of this motion, must have subjected him to a heavy expenditure, and a good deal of labor. The order for allowance will, under the circumstances mentioned, be modified so as to award the plaintiff two and one half per cent, instead of five per cent, upon the verdict.

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SUPREME COURT.

ASTIE agt. LEEMING and others.

Injunction — Answer — Parties — Waiver.

A court is not justified in interfering with an injunction, unless the equities of the complaint be denied on positive knowledge and not on information and belief.

To authorize an injunction restraining the employment of any agent other than the plaintiff by the successors of one who had contracted that such plaintiff should be his sole agent, it is not necessary to show that the successors knew the terms of the contract under which such agent was appointed; it is sufficient to show that they knew him to be acting as agent; it was for the successor to inquire as to the terms of the appointment.

An objection that the necessary parties are not before the court must be raised by the answer. If not so raised it must be deemed waived, and cannot be urged upon a motion to vacate an injunction.

Special Term, August, 1877.

VAN BRUNT, J.—One Henri Nestle was, prior to the month of August, 1870, the manufacturer of an article of food called "farine lactee," in Switzerland. At the above date he entered into a contract with the plaintiff, giving him the exclusive right to sell this product in all North America, and bound his successors by that contract. Early in the year 1875, Nestle sold out his business to Messrs. Roussi, Monnerat & Marquis, as is claimed by the plaintiff, or to a corporation in which these gentlemen were members of the board of directors. That the sale was not to a corporation would seem to be evidenced by the fact that Mons. Monnerat, in a letter of the 25th of March, 1875, to the plaintiff, speaks of "our

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said firm having taken possession of the factory," &c. Subsequently the defendants Leeming & Woodruff were appointed the agents for the sale of the said article of food in the United States, by the successors of Henri Nestle.

This action is brought to restrain the defendants, Leeming & Woodruff from the sale of such article of food, and from acting as the agents for the sale thereof.

The defendants Leeming & Woodruff, who alone have appeared, claim that the injunction should be dissolved, upon the grounds: First. That all the equities of the complaint are denied by the answer. Secondly. That Nestle never assigned his business to Roussi & Co. Thirdly. That the plaintiff has failed to perform his contract with Nestle. Fourthly. That a new and different contract was entered into between the successors of Nestle and the plaintiff; and, lastly. That the successors of Nestle are not bound by his contract with the plaintiff, not having any notice of the same at the time of the transfer of the business to them.

The first ground is not well taken, because the equities of the complaint are denied on information and belief in the answer, and the verification gives no guide whatever as to what allegations are claimed to be denied on positive knowledge and what on information and belief. Most of the denials must have been upon information and belief, because the facts could not have been possibly within the personal knowledge of the defendant verifying the answer.

The denial in the answer that at the time of the transfer the successors of Nestle had no knowledge of the existence of the contract mentioned in the complaint may be entirely true; but that the said successors knew that the plaintiff was acting as the agent of Nestle, under some contract, is amply evidenced by the correspondence, and such being the fact, it was their duty to ascertain the terms of the contract. As to the second ground of objection, it is sufficient to say that Nestle assigned his business to the principals of Leeming & Woodruff; and the conclusion plainly deducible from the

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correspondence is, that it was to a firm and not to a corporation (*see letter from Monnerat to plaintiff, March 25, 1875*); and even if said assignment was to a party not made a defendant in this action, the defendants Leeming & Woodruff, by their answer, must raise the objection that the necessary parties are not before the court, or otherwise that objection must be deemed waived. No such objection has been raised by the defendants' answer in this case. As to the third objection, the correspondence shows that the successors of Nestle made some complaint that the plaintiff had not complied with his contract, after they had desired to get rid of him, and that the plaintiff claimed that he had performed his contract, and the particulars of the performance are given; and this court will not hold that contract broken, except upon decidedly more conclusive evidence than has been presented upon this application.

As to the fourth objection, it will be sufficient to say, that the allegation in the answer of the entering into a new agreement between the plaintiff and the successors of Nestle, is evidenced only by the affidavit of Constans Rubdy, who swears he was told by Messrs. Monnerat & Roussi, that such new agreement had been entered into December, 1875, in Switzerland. Such evidence, of course, is entirely insufficient to sustain an affirmative allegation of an answer upon a motion of this description. The correspondence does not show that the plaintiff ever waived any rights under his contract with Nestle, except possibly as to Canada. It seems to me that the motion to vacate the injunction must be denied, with costs.

Sink agt. Sink.

SUPREME COURT.

FANNIE SINK, administratrix, &c., of LEOPOLD SINK, deceased,
agt. BABETTE SINK and others.

*Will—residuary clause—Trust—Intestacy—Devise in lieu of dower—
Distribution—Costs.*

Where a testator gave to his wife \$5,000 to invest same and apply the income to the use and benefit of his son Leopold for life, and further directed that the *share of Leopold in the residuary estate* should also be paid to his wife, to receive the income thereof and apply the same to the use and benefit of said son L.:

Held, That the sum of \$5,000 did not pass under the residuary clause of the will, but that as to the same, after the death of Leopold, the testator died intestate.

Also *held*, that a bequest and devise to the testator's wife "*in lieu of dower*" did not exclude her participation in the personal estate, as to which he died intestate.

Where the testator, by the residuary clause of his will, gave the remainder of his estate to his wife and five children, share and share alike, but directed the share of his son Leopold to be paid over to the testator's wife, in trust, to apply the income to the use and benefit of Leopold for life:

Held, that upon the death of Leopold the portion of the estate designed for his support went to his heirs and next of kin.

New York Special Term, 1875,

Orlando L. Stewart, for plaintiff.

Albert Cardoza, for defendants, Babette Sink and others.

VAN VORST, J.—Lewis Sink, having first made his last will and testament, died in 1866, leaving a widow, the defend-

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ant Babette Sink, and several children, among whom was a son Leopold. In and by the third paragraph of his will he provided as follows:

"Thirdly. I give and bequeath to my wife, Babette, the sum of \$5,000, in trust, to securely invest the same, and apply the income thereof to the use and benefit of our son, Leopold, as long as he shall live, and I further direct, that the share of my said son Leopold, in the residuary estate, under this my will, shall be also paid to my said wife in trust, to receive the income and profits thereof, and apply the same to the use and benefit of our said son Leopold, as long as he shall live."

"Fourthly. All the rest, residue and remainder of my estate, real and personal, I give and devise as follows: One-half part thereof to my beloved wife Babette, absolutely forever, in lieu of dower, and the other half thereof to my children, Eli Sink, Caroline Korn, Delia Korn, Leopold Sink, and Isaac Sink, to be divided among them equally, share and share alike, absolutely forever, the share coming to my son Leopold to be paid over to my wife, in trust, as hereinbefore provided."

The testator's son Leopold was subject to fits of epilepsy, and the evidence is that the father was anxious to make some provision for him for life.

The provisions in trust doubtless proceeded from this parental desire.

It was clearly the intention of the testator that Leopold should not, during his life, personally receive or manage any part of the principal of the estate. He was to be maintained out of the income of the \$5,000, specifically set apart, and given to his wife for the purpose, as mentioned in the third paragraph of the will, and out of the income of his share of the residuary estate, which share, during the life of Leopold, Babette Sink, the widow of the testator, was to hold and manage.

After the death of his father, and in the year 1870, Leopold Sink intermarried with the plaintiff.

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In 1874, Leopold died, leaving the plaintiff, his widow, him surviving, and one daughter, Lillie Sink, an infant of about the age of three years.

The natural construction of the third clause of the will would seem to indicate that the principal sum of \$5,000, set apart, and directed to be invested, the income whereof was to be applied to the use and benefit of the testator's son Leopold, did not pass under the residuary clause of the will.

A distinction seems to be made by the testator between such sum of \$5,000, specifically bequeathed to his wife, for such purpose, and the rest, residue and remainder of his estate, which passed under the fourth clause of the will; for in this third clause, the testator directs that the *share of his son* Leopold, in the *residuary estate*, should *also* be paid to his wife in trust, to receive the income and profits thereof, and apply the same to the use and benefit of Leopold, in trust, as hereinbefore provided. That is, the income of the share of Leopold in the residuary estate, in addition to the income arising from the \$5,000, shall be so applied.

I should say, therefore, that the principal sum of \$5,000, specifically given to his widow in trust, the income of which was to be applied for life to the use and benefit of Leopold, did not pass under the disposition made of the residue and remainder of the estate, under the fourth paragraph of the will, but was designedly excepted therefrom, and that with respect thereto, it not having been elsewhere finally disposed of, Lewis Sink died intestate.

That \$5,000 has been treated by the counsel for all the parties, upon the argument, as personal estate.

It was a specific sum, to be invested for the benefit of Leopold during his life, and was actually held for such purpose up to the time of his death.

The trust ending with the life of Leopold, the principal sum of \$5,000, upon that event, went to the widow and next of kin of Lewis Sink, according to the statute of distributions of the personal estate of intestates.

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The devise and bequest to the widow, in the fourth clause of the will, was "*in lieu of dower*." Dower is a technical term, having a well-defined meaning, and there is nothing to indicate but that it was used by the testator in its primary sense, as indicating an interest in real property. The testator's qualification and limitation does not exclude a participation by his widow in the personal estate of which no testamentary disposition was made.

In this view of the \$5,000, which, by the terms of the bequest, is treated as personal property, the widow of the testator is entitled to one-third, and the balance goes to the five children of the testator, in equal parts, the representative of a deceased child to take the share of a parent.

Lillie Sink, the daughter of Leopold, is entitled to the one-fifth part of this balance, and the same should be paid to her legally constituted guardian, to be invested for her benefit, until she attains the age of twenty-one years, or until the further order of the court in the premises. The share out of the residuary estate, designed for his son Leopold, was given and devised to him absolutely. But, during his life, it was substantially to be managed by his mother, the widow of the testator.

It was the property of Leopold, subject to the trust.

Upon the death of Leopold the trust terminated, and this portion of the estate descended to his heirs and next of kin.

But it appearing that the share of the residuary estate of the testator provided for his son Leopold was, during his lifetime, reduced to and become personal property, the same should be treated as such for the purposes of distribution.

The same should be paid to the plaintiff, to be held by her as administratrix of her husband's estate, to be administered and disposed of according to law.

The judgment to be entered shall provide for the payment of that portion of the defendant Lillie Sink to her legally constituted guardian, to be invested as is before mentioned.

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The costs and allowance of all the parties should be paid out of the two funds as follows:

The plaintiff's costs and allowance out of the share of Leopold Sink, in the residuary estate.

The defendants' costs and allowances out of the sum of \$5,000, mentioned in the third paragraph of the will, as to which Lewis Sink died intestate.

No appeal was taken.

Spicer agt. Ayers.

SUPREME COURT.

JOHN D. SPICER and another agt. MARY FRANCIS AYERS.

Conveyance by husband to wife—Action by general creditor to set aside on ground of fraud.

Where a husband takes title to a piece of property in the name of his wife, when he is not insolvent or contemplating it, and when the title is recorded and the husband afterwards becomes unfortunate upon subsequent contracts not then even contemplated, such conveyance will not be held fraudulent as to such *future creditors*.

A deed, taken in the name of the wife, the consideration-money for which being paid by the husband, is not necessarily fraudulent as to *existing creditors*. The presumption of fraud in such case can be overcome by proof.

The cases of *Carpenter* agt. *Cook* (10 *N. Y.*, 227), and *Case* agt. *Phelps* (39 *id.*, 164) commented on and distinguished.

Rensselaer County Circuit, November, 1875.

ACTION by a general creditor to set aside conveyances made by the husband to the wife during his lifetime, on the ground of fraud.

Smith, Fursman & Cowen, for plaintiffs.*Mr. Lansing and Mr. R. A. Parmenter*, for defendants.

WESTBROOK, J.—A very brief outline of the reasons which induce me to render a judgment for the defendant is all that will be attempted.

Without any examination, the decision of the court at general term, that an action in this form is maintainable, will

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be assumed. It is the law of this case, and the special term has neither the power or the will to question its accuracy. If the counsel for the plaintiffs wish to amend the pleadings and proceedings by making Mrs. Ayers a party in her representative capacity, no objection is seen to that being done, as she has had full opportunity on this trial to question the claims of the plaintiffs as against her husband's estate.

None of the demands of the plaintiffs were in existence when Mrs. Ayers acquired title to the premises. It is true they were then creditors, but a proper application of the moneys paid by Ayers in his lifetime would extinguish that portion of the account then existing, and the greater part of the subsequently accruing account was also paid by him.

When the wife obtained the title, Ayers was neither insolvent nor contemplated insolvency, nor was the contract for building the house, in the erection of which plaintiff's debt accrued, made or contemplated; and I cannot, therefore, find as a fact that the wife took the title to defraud any person. It was an open act, the deeds were on record, and no person could have trusted Ayers upon the faith of the property.

The case, then, presents this question: If a husband takes title in the name of his wife when he is not insolvent or contemplating it, and when the title is recorded and the husband afterwards becomes unfortunate upon subsequent contracts not then contemplated, will such conveyance be fraudulent as to such future creditors? To hold the affirmative will be to decide that in no case can a husband, when prosperous, make provision for his family. A proposition to which I cannot subscribe.

In some cases, and under some circumstances, such conveyances have been held fraudulent. In *Carpenter agt. Cook* (10 N. Y., 227), the husband, the day after he had made a hazardous contract in the purchase of corn, placed his property in trust for the benefit of his wife. He was also largely in debt at the time. This conveyance was held void, because the contract which made the husband insolvent had already

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been entered into, and his property was surely applicable to make good any existing contract and to pay creditors then existing, upon whom his conveyance, if valid, threw the risk of the enterprise. In *Case agt. Phelps* (39 *N. Y.*, 164), a husband, who owned real estate worth \$2,000 more than the mortgage upon it, conveyed to his wife such property, and without putting the deed upon record, borrowed \$700 to embark in a new business, in which he failed. The deed was properly held void, because it was evidently made so as to compel creditors to take the hazard of the new enterprise, and the deed not being recorded, the money to embark therein was borrowed upon the faith of the property.

No such reasons as existed in these cases exist here. Ayers was solvent; he did not expect to become insolvent; he had on hand no hazardous contract, and contemplated none; he put the title to his wife on record, and long after the conveyance he made the contract, in the performance of which he incurred the plaintiff's debt, and sustained the loss. No principle of public policy or justice, in my opinion, makes the conveyance void. The contracts are all subsequent to the conveyances to the wife, and, as such conveyances were on record, it is to be presumed they were made with full knowledge of their existence. If they are void, then no husband can, with safety, make reasonable provision for his wife and family, when, in doing so, no creditor at the time is injured, when no shift of property is made to throw losses of an existing contract on creditors, when no debts have been contracted on the faith of title to property in him, and when such transfer was in good faith and without any intention to cheat or defraud. It has been held (*Dunlap agt. Hankins*, 59 *N. Y.*, 342) that a deed taken in the name of the wife, the consideration money for which was paid by the husband, was not necessarily fraudulent as to existing creditors, but that the presumption of fraud could be overcome by proof. Must not the doctrine apply here? The creditors here are subsequent creditors. They have not allowed their debt to

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be contracted upon the faith of the property. With open eyes, knowing the wife to have the title, they trusted the husband, and to him, or to his estate, must their remedy be confined. I know of no principle of law which will take from the wife and children the reasonable provision which the husband and father made for them in the days of his prosperity, when no fraud was intended, and when the deceased husband and father, and not the particular property sought to be charged, was trusted to the extent of the plaintiff's claims.

The attorneys for the defendant will prepare the necessary findings, which will be settled on notice.

Conkling agt. Davies.

N. Y. SUPREME COURT.

ELIZABETH M. CONKLING agt. HENRY E DAVIES and JULIEN
T. DAVIES.*Deed of trust — Action to reform and revoke — Parties.*

In an action to reform and revoke a deed of trust all the beneficiaries named in the deed are necessary parties.

They are entitled to be heard upon the question as to whether the deed should have contained a power of revocation.

Special Term, May, 1877.

THIS is an action to reform and revoke a deed of trust made by the plaintiff to the defendants.

The said deed conveyed to the defendants certain property in trust to collect the income and profits of the same and pay the same to the plaintiff during her life, and after her death to pay such income to one Elizabeth T. Conkling, and after her death to divide the principal among certain persons in said deed named. It also conveys certain other property, the income of which, after the death of the plaintiff, is directed by said deed to be paid to certain other parties. None of the parties entitled to share in the estate by the terms of the deed after the death of the plaintiff are made parties to the action. The defendants demur to the complaint upon the ground of defect of parties.

*Horace Barnard, for plaintiff.**Ashbel Green, for defendants.*

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VAN BRUNT, *J.* — The plaintiff claims that the beneficiaries named in the deed are not necessary parties because the deed as drawn does not contain a power of revocation which she claims should have been inserted therein pursuant to her directions, and if such power of revocation was in the deed she would clearly have the right to the relief asked for in this action.

I am entirely unable to see why the beneficiaries are not entitled to be heard upon that question. By means of this action it is sought to deprive them of all interest under this deed without giving them an opportunity to be heard upon the question. They are certainly as necessary parties as the trustees under the deed, and any decree which the court might make in this action could not deprive them of the contingent interest which they had under the deed, they not being parties to the action. The demurrer must therefore be sustained, with leave to the plaintiff to amend upon payment of costs.

Duigan agt. McCormack.

SUPREME COURT.

JAMES T. DUIGAN agt. KATE A. MCCORMACK and others.

Gifts inter vivos, when not disturbed — Creditors.

Where a woman, the owner of fifty-six shares of stock in the Home Insurance Company, during an illness, of which she afterwards died, in a letter written in Ireland to her sister in New York made a disposition of the shares to certain persons named in the letter, and also made provision for the payment of a sum of money she owed, and afterwards executed to her sister a power of attorney authorizing her to take all needful measures to effect a transfer of the stock, and the power having been executed by the surrender of the scrips to the company, and the issue of her shares to the donees mentioned in the letter, in part at least during the lifetime of the donor, it not appearing that she owed any debts other than the one named:

Held, that the gifts and dispositions made would not be disturbed by this court, in an action brought by a brother of the donor who sought to set them aside as invalid.

Special Term, New York, February, 1876.

A. B. Tappen and J. S. Mackay, for plaintiff.

Roe & Macklin, for defendant Kate A. McCormack.

Edward Patterson, for Home Insurance Co.

VAN VORST, *J.* — No sufficient reason, in law or equity, has been assigned for breaking up or disturbing the gifts and disposition made by Maria L. Leahy, in her lifetime, of her fifty-six shares of stock in the Home Insurance Company, as clearly expressed and made in her letter to her sister, the defendant Kate A. McCormack, dated the 10th day of October, 1873,

Duigan agt. McCormack.

written in Ireland, during an illness, of which she died in June following. The donees of her property, and the shares assigned to each, are declared in this letter.

Provision was also made for the payment of her indebtedness to Patrick Ryan. There is no evidence of any indebtedness to any other person; and even though there might be creditors other than the one mentioned, the disposition made by Mrs. Leahy of her shares of stock could not be impeached for that reason, in this action, under the allegations of the complaint. There is no foundation laid for relief on any such ground in the pleadings.

But the language of her letter would seem to repel any presumption that there were in fact creditors to be wronged by her disposal of the shares in question.

The writing was evidently made by a person during illness, threatening to prove mortal, conscientiously desirous of wronging no one, but anxious in her lifetime to give away her small property to those who had claims upon her, as she felt, not forgetting the payment to Patrick Ryan in full £300, which she had borrowed from him.

I regard the power of attorney of the 27th November, 1873, as an instrument designed and necessary to carry out her intentions as expressed in her letter of October previous, and which could not be effectuated under the power then in New York, to Thomas Dougherty. He could collect dividends only. Her sister, Kate A. McCormack, was by the power of November, fully authorized to take all needful measures to effect a transfer of the stock, indispensable to perfecting the gifts made, and the disposal of the shares, under the letter of the 10th October.

The power was sufficient to authorize the company to cancel the old certificate, and issue new ones, as she might appoint. She was authorized "to ask, demand, sue for, recover and receive from the Home Insurance Company, the amount of the fifty-six shares of stock" standing in the name of the donor on the books of the company.

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And there was given to Mrs. McCormack, the attorney, "full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as Mrs. Leahy could have done, if personally present."

And the power was fully executed, and the duties devolved by the letter of the tenth October discharged, as far as they could be, during the lifetime of Mrs. Leahy. The shares of stock standing in her name were, before her death, delivered up and canceled, and new scrip was actually issued to the donees, or some of them, before that event happened. The gifts made were to that extent perfected by delivery, before the death of Mrs. Leahy. That was sufficient to uphold the gifts. And the defendant, Mrs. McCormack, is in good faith, as far as the evidence shows, proceeding to pay out of the other shares, and the income thereof, as directed, the debt due to Patrick Ryan, and has already discharged 200 of the £300 directed to be paid him as provided for.

As already indicated, there is no equity in the plaintiff's claim, and his complaint should be dismissed, and as by the investigation which appears to have been had in the surrogate's court the plaintiff was apprised of all these matters, he should be charged with the costs of this action.

In re Joseph Mooney and Isaac Mooney.

U. S. CIRCUIT COURT.

In re JOSEPH MOONEY and ISAAC MOONEY.

Bankruptcy — Assignee — what is necessary to entitle the assignee to an order directing bankrupt to pay or deliver over money or property.

To entitle an assignee to an order directing a bankrupt to pay or deliver over money or property, it must affirmatively appear:

1. That the bankrupt has possession of it.
2. That he has refused to deliver it on demand made.

If the bankrupt renders an account of the property sought to be reached, it is not sufficient that the account is *unreasonable*; there must be evidence of its untruth (*Per* BLATCHFORD, J.).

On an application to review the decision of the district court upon the question whether the bankrupt has made a full disclosure in obedience to an order requiring it, the proposition to be made out by the petitioner must be that a reasonable man would not be able to give credit to the relation given by the bankrupt, but would be satisfied of its substantial untruth (*Per* JOHNSON, J.).

THE above-named bankrupts were duly adjudged bankrupts by the district court, upon a petition filed against them by their creditors, on the 4th of August, 1874.

The said bankrupts filed their schedules in this matter, and James T. Leavitt was appointed assignee.

The assets of the bankrupts were turned over to the assignee, and consisted, according to his statement, of the remainder of their stock of goods, which was sold at auction under the direction of the assignee, and from which sale was realized in gross the sum of \$4,010.06.

The said bankrupts claimed to have no cash on hand, and none was received by the assignee except such as was realized from the sale aforesaid, and about \$800 collected from some

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outstanding accounts due the bankrupts, and safe and pictures.

The debts and bills receivable set out in the schedules were surrendered to the assignee.

The debts owing by the said bankrupts amounted to about \$55,000, principally for merchandise.

At the time of their bankruptcy the said debtors were engaged in the city of New York, in the business of manufacturing of clothing.

On the 27th day of November, 1875, a petition, affidavit and notice of motion was served on the bankrupts, and filed in the district court by the assignee, praying that the bankrupts be required to account and pay over to him the following property and moneys, to wit: The sum of \$7,147.05, drawn by Joseph Mooney from January 1, 1874, to July 16, 1874. The sum of \$8,421.10, drawn by Isaac Mooney during the same time. The sum of \$1,600 paid to and drawn by Leopold Mooney, from April, 1873, to July 16, 1874. The sum of \$3,200 drawn out over the real expenses of their business from April 30, 1874, to July 16, 1874; and also merchandise, or the proceeds thereof, of the value of \$30,000 and over. That the said bankrupts be cited to appear and account for and pay over such property or such part thereof as the court may find that they possessed, owned or had under their control and possession at the time of the filing of the petition in bankruptcy, and that upon their failure to comply with the order or decree of this court to be made in the premises, they and each of them be attached and punished as for a contempt of court, and that such other relief be granted as may be just.

To this petition the bankrupts answered as follows:

The bankrupts, Joseph Mooney and Isaac Mooney, answer the petition of the assignee herein, as follows:

They admit having on hand on the 1st day of January, 1874, goods of the value of about \$10,000, and that they thereafter, up to the time of their failure, purchased goods of the value of \$65,906.16 or thereabouts, out of which they sold

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goods of the value of about \$49,802.71, leaving a balance to be accounted for of about \$16,000, exclusive of profits.

At the time of their adjudication they had on hand goods of the cash value of about \$30,000, which, in fact, cost about \$40,000, all of which they surrendered and delivered up to their assignee herein.

They have fully and fairly accounted to said assignee for all property or money belonging to their estate at the time of their failure, and all moneys drawn by them or paid to any person was drawn and paid in good faith, and duly and regularly entered in their books, in the possession of said assignee.

The money drawn by said bankrupts for their personal use, up to the date of their adjudication, has been duly accounted for.

The money paid to Leopold Mooney was paid to him in good faith, and so appears from the books of said bankrupts as having been money deposited by him with them, covering a period of about nine years prior to said adjudication.

And further answering the petition of said assignee, said bankrupts aver that prior to making said petition, said assignee commenced two certain suits in the United States district court for the southern district of New York; one against the said Leopold Mooney and the other against H. Rich, to recover from them the identical sums of money sought to be reached by this present proceeding, which said suits are now pending and undisposed of, and said bankrupts urge the pendency thereof in bar of this present proceeding.

On the 10th day of June, 1876, a reference was ordered to Isaac Dayton, one of the registers in bankruptcy, to examine the bankrupts as to the property, and the several sums of money alleged in the petition of the assignee to have been in their possession at the time the petition in bankruptcy in this proceeding was filed against them.

The bankrupts appeared before the register and were examined, and the referee reported, as the result of the exami-

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nation, and in his opinion, that the said bankrupt, Isaac Mooney, has not fully accounted for the said sum of \$7,149.05 received by him at or about the time of the filing of the petition in bankruptcy herein; that the said Joseph Mooney, at the time of the filing of the petition, had in his possession at least the said sum of \$3,300.

And the said bankrupt, Isaac Mooney, has not fully accounted for the said sum of \$8,421.10 received by him at or about the time of the filing of the petition in bankruptcy herein; that the said Isaac Mooney has not accounted for \$3,300 of the said sum of \$8,421.10; and that the said Isaac Mooney, at the time of the filing of the petition in bankruptcy herein, had in his possession at least the said sum of \$3,300.

And that an order ought to be made in the said bankruptcy, requiring the said bankrupts, each of them, to pay and deliver to the assignee in bankruptcy the said sum of \$3,300 so as aforesaid, at the time of the filing of the petition in bankruptcy herein, in their possession.

Upon this report a motion was made for the order prayed for in the petition of the assignee, which motion was denied by judge BLATCHFORD in the district court, as follows:

BLATCHFORD, J. — I am unable, on the evidence, to concur in the conclusion that the bankrupts are shown to have had in their possession or under their control, at the time the petition in bankruptcy was filed, any of the moneys which they drew out of the assets of their firm before such petition was filed. Therefore the prayer of the assignee's petition, in respect to such moneys, must be denied.

From which decision an appeal was taken by the assignee to the United States circuit court.

Blumensteel & Ascher, for appellant. That upon the report and opinion of the register that the bankrupts each had the sum of \$3,300 which they had concealed from the assignee and refused to deliver over to him, the assignee was entitled

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to the order as prayed for; that the manner in which the bankrupts sought to account for the fund in question was unreasonable and manifestly untrue; that there was no obligation to believe the testimony of the bankrupts, where its truth was unreasonable, unless corroborated, and cited *Salkey* agt. *Gerson* (11 *N. B. R.*, 520) and the cases therein cited.

Richd. S. Newcombe, for respondents. The order of the district court was correct and should not be interfered with. There was no evidence to support the opinion or the report of the register. The bankrupts answered all questions put to them in reference to any disposition of their property. That before the prayer of the petition could be granted it was necessary for the assignee affirmatively to prove that the bankrupts had concealed the funds and property sought to be reached. *Salkey* agt. *Gerson*, relied upon by appellant, does not apply. The authorities leading judge *Blodgett* to that decision were English cases based upon section 260 of 12 and 13 Victoria, which is much more comprehensive than our section 26 of the bankrupt law. But the decision in *Salkey* agt. *Gerson* was based upon the theory that it appeared, to the satisfaction of the court, that the property in question was still in the control of the bankrupts, in some manner growing out of their refusal to explain, but nothing of the sort here appeared.

JOHNSON, J.—This is a petition by the assignee of the bankrupts to review and reverse an order of the district court made November 25, 1876, denying the prayer of the petition of the same petitioner presented to the district court on the 8th of December, 1875. This petition asked that the bankrupts might be ordered to pay over certain money alleged to be in their hands, and might be attached and punished for contempt if they did not obey such order.

An order was made upon this petition, to which the bankrupts had filed an answer, referring it to one of the registers

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to take proofs upon the issues raised by the answer of the bankrupts in respect to the moneys alleged to be in their hands. Upon this order voluminous proofs were taken and reported to the district court.

Upon these proofs the parties were heard, and on the 10th of June, 1876, an order was made reciting that the bankrupts had received between the 1st of January, 1874, and the 16th of July, 1874, the day of their failure, from the assets of the firm, the following sums, viz.: Joseph Mooney, \$7,147.05, and Isaac Mooney, \$8,421; that neither of them had accounted for such sums received by him, and requiring each of them to show, on oath, what he did with the money, and fully account for the same, and it was referred to the same register to take the proofs and report the testimony, with his opinion. A voluminous examination was reported by the register, with his opinion that each of the bankrupts had in his hands, at the time of the filing of the creditors' petition for the adjudication of bankruptcy, the sum of \$3,300, and advising their commitment as for contempt in not paying the same to the assignee. Upon the presentation of this report to the district court, the order was made which is now under review.

I have carefully examined this mass of testimony, and I do not see any ground for fixing any particular sum of money as being unaccounted for by the bankrupts. According to their testimony it was all expended before the filing of the petition against them.

The account which they have given of the way in which the money was spent was undoubtedly subject to criticism, and was not calculated fully to satisfy the judgment, but did leave suspicions behind it as to its entire truthfulness. It has, however, been passed upon by the district judge, who has not been himself able to pronounce that the bankrupts have not complied with the order of the court, by making all the disclosure which is in their power. It certainly may be true that they have told all they are able to tell; and it is

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not claimed that any further examination is likely to yield any further results. The bankrupts have answered all the questions put to them. If their answers are true, they have obeyed the orders of the courts.

The district court has not felt it to be its judicial duty to declare them untrue and to proceed to punish the bankrupts on that basis. In reviewing a decision of the district court on a question of fact, and especially upon one of this nature, it is for the petitioner to satisfy the court that a wrong decision has been arrived at (*In re How*, 6 *N. B. R.*, 10). The proposition to be made out must be, that a reasonable man would not be able to give credit to the relation given by the bankrupt, but would be satisfied of its substantial untruth. It would require a very clear case to make that out, in the face of a decision of the district judge sustaining the bankrupts' story; or, putting it at the lowest, not discrediting their story, so as to feel it right to act judicially on the basis of its willful falsity. As the question is stated by judge DRUMMOND, *In re Salkey & Gerson* (11 *N. B. R.*, 520), did it or did it not satisfactorily appear that the bankrupts had not made a full disclosure? And to this question the district court has answered in the negative. With this decision it seems to me my duty to concur, unless I am satisfied that the district judge ought clearly to have decided the other way. The *Case of Salkey & Gerson* (11 *N. B. R.*, 423 and 516) was much stronger than this now before the court. The district judge in that case held the bankrupts not to have made a full disclosure, and committed them. Eight months before their failure they had bought goods to the amount of \$35,000, had not paid for them, and had remaining only \$6,000 worth, at their own valuation. They gave no account whatever as to what had become of them. Yet judge DRUMMOND, when the bankrupts were brought before him on *habeas corpus*, thought it proper, while holding that the power of the district court was complete, and that there was no relief to be given on *habeas corpus*, to send the parties back before the register

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who had charge of the case, and order that upon their further examination he might report whether the bankrupts had made a full disclosure of what they knew. The English cases which were cited (*In re Bradbury*, 78 *Eng. Com. Law*, 14; *S. C.*, 14 *Com. B.*, 15; *Ex parte Nolan*, 6 *T. R.*, 118; *Ex parte Perrott*, 2 *Burron*, 1122, 1215, and *Ex parte Lord*, 16 *M. and W.*, 462) are founded upon statutes conferring expressly upon the commissioners, if, in their opinion, the examination of the bankrupt is unsatisfactory, the power to commit him. I do not think our statute is as broad as the English statutes, and therefore the decisions founded upon them are not entirely safe guides as to the powers to be exercised under our statutes. The application to this court upon review to reverse the order of the district court in this matter made and entered November 25, 1876, is therefore denied, and the clerk will certify this order to the district court. •

Martin agt. Windsor Hotel Company.

COURT OF APPEALS.

WILLIAM R. MARTIN agt. THE WINDSOR HOTEL COMPANY.

Reference — Action by an attorney for services — Appeal — distinction between discretionary orders and orders involving matters of substantial right — in what cases such orders may be reviewed by appeal.

An action by an attorney for services, where the defense is that the charges are exorbitant and oppressive, is referable under the statute; but whether it should be referred or not is *discretionary* with the court or judge before whom the cause is pending.

The general term has the power to review such order of the special term, notwithstanding it is discretionary.

It is only necessary that the order, to be appealable from the special to the general term, must affect a substantial interest — a matter of substance, and not of mere form, and it may be such an order and yet be *discretionary*.

But such an order is not appealable to the court of appeals.

A reference is not an absolute right in any case. Whether the court will exercise the power conferred of referring any action which the statute authorizes to be referred, depends upon all the circumstances of the case, and the exercise of the power in a given case, is reviewable by the general term, but *not* by this court.

June Term, 1877.

THIS action was brought by Mr. Martin against The Windsor Hotel Company for professional services as legal adviser, &c., and at special term an order was made granting a reference of the issues in the action. The reference was to an attorney of the court. The defendants appealed, and although there was no question that the issue involved the examination of a long account, and that the court, therefore, had power to order a reference, the general term declared

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that they had power to review the order, notwithstanding it was discretionary, and held that, under the circumstances, the present issues, involving a lawyer's claim against his client, should not be referred to a lawyer, and reversed the order, leaving the action to be tried by a jury in the ordinary way (*See 10 Hun, 304*).

The plaintiff appeals to this court, and the defendant asks that the appeal be dismissed.

Luke A. Lookwood, for appellant.

James Emott, for respondent.

CHURCH, *Ch. J.*—It is conceded that the action is referable under the statute, and whether it should be referred or not was discretionary with the court below, and the order is not, therefore, appealable to this court. The point insisted upon is that the order was not appealable to the general term. Section 349 of the Code provides (among other things) that an order is appealable from the special to the general term, "when it involves the merits of the action or some part thereof, *or affects a substantial right.*" The question is, whether this order affects a substantial right. It is claimed that a substantial right, within the meaning of the Code, is an absolute legal right, and that a matter which is discretionary is not a substantial right, and hence not appealable to the general term. There are judicial expressions made during the earlier period of the Code which favor this view, but it is an erroneous construction, and it has been settled that the general term may review orders that affect substantial rights, although discretionary. DENIO, J., in 29 *New York*, 418, in defining a substantial right, distinguished it from a merely formal matter or right. It is only necessary that the order, to be appealable, must affect a substantial interest, a matter of substance and not of mere form, and it may be such an order, and yet be discretionary. The Code, in section 11,

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subdivision 4, recognizes that an order affecting a substantial right may be discretionary, by providing that an appeal will lie to the court of appeals, in certain cases, from an order affecting a substantial right "*not involving any question of discretion.*" It has been urged that as the court of appeals will not review a discretionary order under the third subdivision of the eleventh section providing for an appeal to that court from a final order in a special proceeding "affecting a substantial right," without the qualifying words employed in subdivision 4 above quoted, the general term has, therefore, no power to review a discretionary order under section 349, where the same words are used. The answer to this is, that the court of appeals refrain from reviewing such orders when discretionary, not from any prohibition implied by the words *substantial right* but from the constitution and functions of the court as an appellate tribunal restricted to a review of questions of law only, while the general and special terms of the supreme court are but different parts of the same court, of equal original jurisdiction, and the former can review and correct orders made by the latter, whether discretionary or not, provided they affect matters of substance (*Howell agt. Mills*, 53 N. Y., 322). The question involved below was a right to a trial by jury or referee, and whether the parties should have the controversy determined by one tribunal or the other was a matter of substance, and hence appealable, although the court had power, in the exercise of its discretion, to order either mode of trial. The constitution of the tribunal, the mode of trial, the effect of the verdict and grounds of review, are entirely unlike, and affect substantial interests of the parties to the action. The constitution has protected the rights of trial by jury in a certain class of cases, and as to others the statute permits a reference. A reference is not an absolute right in any case. Whether the court will exercise the power conferred of referring any action which the statute authorizes to be referred, depends upon all the circumstances of the case, and the exercise of

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the power in a given case is clearly reviewable by the general term, but not by this court.

The appeal to this court must therefore be dismissed.

All concur.

NOTE. — The jurisdiction of the court of appeals is defined by the new revision of the statutes (*Code of Civil Procedure*, sec. 190). By a comparison of this section with section 11 of the former Code, it will be observed that the language of subdivisions 2 and 3 of the present Code preserves the distinction which marks section 11 of the former Code, by which the clause excluding orders involving any discretion is preserved in respect to orders made in the course of the action, but is not contained in subdivision 3, which relates to special proceedings and summary applications after judgment. But the principle which the court of appeals lays down, will be equally applicable under the new statute as under the old, and excludes from review, by appeal to that court, orders involving questions of discretion when made in special proceedings or after judgment, equally as when made in the course of an action before judgment. — [ED.]

Sullivan agt. O'Keefe.

SUPREME COURT.

SULLIVAN agt. O'KEEFE.

Action for specific performance—Settlement by parties—Defendant's attorney insists upon continuance of action unless his costs are paid—Motion by plaintiff for dismissal of the action—Attorney's lien for costs.

Where no judgment has been entered in an action, an attorney has no vested right to costs therein. Whatever claim he has for his services is against his client on the retainer.

Although there are cases holding that a party may not discharge a judgment actually entered, and thus deprive his attorney of his costs in such judgment, yet it seems that parties may settle their controversies without consulting the wishes of their attorneys, or even against their wishes, save where judgment has been entered including costs, or where the attorney has obtained a lien on the subject matter of the action.

The attorney gets no such lien under his retainer alone.

Where an action was brought for the specific performance of a contract for the sale of real property, after the cause was at issue, but before trial, the parties made a settlement of the subject of the action, notwithstanding which the defendant's attorney insisted upon proceeding with the action unless his costs were paid him. The plaintiff thereupon moved for a dismissal of the action.

Held, that, as in fact there was no longer a controversy between the parties, the action should not be continued at their expense, either for the profit or emolument of others, and that the motion for discontinuance should be granted.

Saratoga Special Term, August 28, 1877.

THE action was brought for the specific performance of a contract for the sale of real property. After the case was at issue, but before trial, the parties made a settlement of the subject of the action, notwithstanding which the defendant's attorney insisted upon proceeding with the action unless his

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costs were paid him. The plaintiffs thereupon moved for a dismissal of the action.

E. F. Bullard, for the motion.

J. Le Buef, opposed.

BOOKES, J. — The motion is made for specific relief, and is followed by the usual claim for such other relief as may be proper on the facts of the case. Thus, the motion resolves itself into one for an order dismissing the action or complaint, on the ground that the action has been settled by the parties. The plaintiff makes the motion, averring that the action has been settled. That the action has been settled by the parties, and that there no longer exists any controversy between them, is not denied; indeed, this stands confessed. But the defendant's attorney objects to the dismissal of the action, and insists that it shall proceed on the ground that the settlement was without his knowledge, and that no provision having been made for the payment of his costs, it was in fraud of his rights. No judgment had been entered in the action; consequently, the defendant's attorney had no vested right to costs therein. Whatever claim he had for his services was against his client on the retainer. It does not appear that the defendant would have succeeded if the case had gone on to trial; consequently, it does not appear that his attorney would ever be entitled to costs in the suit. There are cases holding that a party may not discharge a judgment actually entered, and thus deprive his attorney of his costs in such judgment. But I am not aware that parties may not settle their controversies without consulting the wishes of their attorneys, or even against their wishes, save when judgment has been entered including costs, or where the attorney has obtained a lien on the subject-matter of the action. He gets no such lien under his retainer alone. I think it would be strange, indeed, if a party may not judge

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for himself as to the propriety of a settlement simply because he has employed an attorney to conduct his case for him in the court. He does not lose his right to determine what is best for him because he has engaged an agent to represent and assist him in court. His free agency remains. The servant does not become greater than his lord. Mr. justice STRONG says, in *Shanks agt. Shoomaker* (18 N. Y., 489): "There is no case which goes far enough to show that a party who has not obtained a judgment in his favor cannot settle a suit, because it may prejudice the possibility, or even probability, that his attorney might obtain his costs by a future trial and a judgment in favor of his client." The question involved in this motion has been repeatedly and fully considered in several recent cases, although, perhaps, under somewhat different facts from those here presented; in none of them, however, were the facts more favorable to the right of a party to settle without consulting his attorney, than in this; and in all of them has the right to settle been recognized and maintained (*Pulver agt. Harris*, 62 Barb., 500; affirmed in the court of appeals, 52 N. Y., 73; also *Wright agt. Wright*, in court of appeals, not yet reported, 16 Law Journal, 88). In these cases the numerous decisions on the subject are cited especially (*See cases cited in Harris agt. Pulver*, 62 Barb., *supra*). It is, too, in accordance with public policy to allow parties entire freedom in the settlement of controversies; and no restraint should be placed on them in this regard, save when they have parted with their right to judge and act for themselves in the matter.

In this case there has been a settlement satisfactory to the parties. They are content to have the case dismissed. There is, in fact, no longer a controversy between them. The action should not be continued at their expense, either for the profit or emolument of others.

Motion to discontinue granted.

Williams *et al.* agt. Gillies *et al.*

SUPREME COURT.

EDGAR WILLIAMS *et al.* agt. JAMES W. GILLIES *et al.**Partnership — agreement to share in the profits — Complaint — Defense.*

An agreement between parties to share in the profits which might arise out of the purchase of real estate, is sufficient to constitute a partnership as to third persons, no matter what they may be *inter sese*.

There may be a copartnership in real estate, and it is not necessary to the existence of such partnership that it be evidenced by a written agreement signed by the partners; but it may be created by parol.

Where the ostensible partner is alone known in the transaction, all persons are held responsible as partners to third persons who are to share in the profits.

It is no defense to an action that a smaller claim than the party is entitled to is made in the complaint.

Defendant D. made a contract with F. for the purchase of the land in question. It was agreed between R., the defendant D. and the defendant G., that the property should be bought for their joint benefit; R. contributing one-half, D. one-quarter and G. one-quarter. It was further understood that D. should take the title and give back the mortgage. The parties each contributed their proportionate share of the purchase-money, and as long as interest was paid upon the mortgage, each paid his proportionate share of such interest.

Held, that R., G. and D. were copartners in the transaction, and all were liable for the debt created in that enterprise.

VAN BRUNT, J. — This is an action to foreclose a mortgage made by William H. Dobbs and wife to Loraine Freeman, now deceased. It appears that, in October, 1872, the defendant Dobbs made a contract with said Freeman for the purchase of the land in question. That it was agreed between William H. Raynor, the defendant Dobbs and the defendant Gillies that the property should be bought for their joint benefit — Raynor contributing one-half, Dobbs one-quarter and

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Gillies one-quarter of the purchase-price. It was further understood that Dobbs should take the title and give back the mortgage mentioned in the contract. The parties, in pursuance of this agreement, each contributed their proportionate share of the purchase-money, paid in part, and also as long as interest was paid upon the mortgage, each paid his proportionate share of such interest. The plaintiff seeks to hold the defendant Gillies for one-quarter of any deficiency which may arise upon the foreclosure of this mortgage. The defendant Gillies claims that he cannot be held, because the whole of the title was vested in Dobbs, and there was no resulting trust which he (Gillies) could enforce against Dobbs, and further, that there is no evidence to show that Raynor, Gillies and Dobbs were copartners in the transaction.

I do not at all consider the claim that is made to bind Mr. Gillies because of the assumption of the mortgage in the deed tendered by Dobbs to Gillies, because there is not sufficient evidence of an acceptance of that deed by Gillies.

The evidence in this case seems to me to establish beyond any question that Raynor, Gillies and Dobbs were to share in any profits which might arise out of the purchase of this real estate. The authorities in this state establish clearly the proposition that such an agreement makes the parties entering into it partners as to third persons, no matter what they may be *inter sese* (*Manhattan Brass Co.* agt. *Sears*, 45 *N. Y.*, 797; *Leggatt* agt. *Hyde*, 58 *id.*, 278), the theory being that every person who shares in the profits deprives creditors of parts of the means of payment. It is well established in this state that there may be a copartnership in real estate, and that it is not necessary to the existence of such a partnership that it be evidenced by a written agreement signed by the partners, but that it may be created by parol; and it is further decided that where such partnership exists, the partners may establish their interest in land, the subject of the partnership, without such interest being evidenced by any writing (*Chester* agt. *Dickinson*, 54 *N. Y.*, 1, and cases there cited).

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These authorities clearly show that Raynor, Dobbs and Gillies were copartners in respect to the purchase of this land. The next objection raised is, that Freeman, the mortgagee, knew nothing of the fact that Raynor and Gillies were the copartners of Dobbs. The principle is well settled that where the ostensible partner is alone known in the transaction, all persons are held responsible as partners to third persons who are to share in the profits (*Story on Partnership, sec 63*).

It is, therefore, entirely immaterial whether the mortgagee knows or did not know at the time he took his mortgage of the existence of the copartnership; all the copartners are liable to him for the debt created in that enterprise.

The objection that the plaintiff, in his complaint, only claims to hold Gillies for one-fourth of the deficiency certainly cannot be objected by him, as it is no defense that a smaller claim than the party is entitled to is made in the complaint.

It seem to us, therefore, very clear, upon authority and principle, that the plaintiff is entitled to the judgment asked for in the complaint.

Judgment accordingly.

Matter of Smal.

N. Y. COMMON PLEAS.

In the matter of JOSEPH SMAL.

Application for discharge of insolvent — Res adjudicata.

Where, upon an application made by an insolvent debtor for a discharge, it appears that the petitioner has before, under the same statute, applied to a justice of the supreme court of this state for his discharge, and in that application issue was duly joined, a trial had, and after a full hearing the application was denied upon the merits, an order duly entered and served, from which no appeal has been taken, and no application made to open those proceedings or to amend the same, *held*, that the doctrine of *res adjudicata* applies, and the application should be denied.

At Chambers, August, 1877.

THE above-named Joseph Smal was, by an order granted by the supreme court of this department, arrested for falsely and fraudulently contracting the indebtedness which was the subject of an action brought against him by the creditor, Jacob Tartter, in a suit in said court, in March, 1876. No motion was ever made by him to vacate that order of arrest, and the same has ever since remained in full force and effect therein against him.

After issue was joined by his sworn answer in that action, the suit came to trial at a special circuit of said court, and on the 9th day of May, 1876, judgment was rendered against him for \$2,137.40 damages, including interest, the full amount of the plaintiff's claim therein.

On the 10th day of May, 1876, judgment for \$2,326, damages and costs, was entered in favor of said Jacob Tartter against said Joseph Smal, in the office of the clerk of this county, in said action; and on the same day execution thereon was duly issued to the sheriff of this county against property

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of the said Joseph Smal, and thereafter duly returned "*nulla bona*" by said sheriff.

Thereupon, and on the 5th day of August, 1876, an execution upon said judgment was duly issued against the person of Smal, to the same sheriff, and the said Smal duly charged in execution thereunder, and has ever since been in full force and effect against him.

On the 14th day of November, 1876, the said Smal, by the service of his petition, with notice of motion, commenced proceedings in said supreme court, in this department, for his discharge from said execution against his person, as an imprisoned debtor under the sixth article, chapter 5, title 1, part 2 of Revised Statutes.

This application was opposed by Mr. Tartter, and after a full and exhaustive hearing and examination of Smal before the court, the motion for his discharge was fully argued before, and submitted to, justice DONOHUE, of that court, on the 24th day of December, 1876, and that on the twenty-sixth day of the same month the said justice denied the motion and remanded the prisoner to the custody of the sheriff under the said execution against his person, and an order to that effect was on the same day duly entered, and on the second day of January next following duly served on the said Smal's attorney in that proceeding.

Thereafter, and on the 10th day of January, 1877, said Smal moved before said justice DONOHUE for a reargument of said motion, and the same was by said justice DONOHUE denied, and an order to that effect duly entered, and on the thirteenth day of January, same year, a copy of the last-named order duly served on the attorney for said Smal in those proceedings.

No appeal has ever been taken by said Smal from either of those orders of 26th December, 1876, and 10th January, 1877, and each of them still remain in full force and effect against the prisoner.

The said Joseph Smal did thereafter, by another attorney,

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in this court, institute the same proceedings for his discharge from said imprisonment under the same statute, namely: Article 6, chapter 5, title 1, part 2, by service of his petition and notice of motion in this court therefor, on the sixteenth day of March last past, returnable at special term thereof, on the thirty-first day of the same month, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard. Which proceedings were, after many adjournments, had on the 13th day of May, 1877, and dismissed on Smal's failure to appear, and his application for his discharge, and all proceedings thereunder, denied.

On the 6th day of July, 1877, said Smal again makes the same application to this court upon the same kind of papers, returnable July 25, 1877, at special term.

Jesse K. Furlong, counsel for creditor Jacob Tartter.

I. The papers presented by the petitioner on this application show "that he is a prisoner confined in the county jail of the city and county of New York on execution issued out of the supreme court against the person of your petitioner for false and fraudulent pretenses in the purchase of goods, wares and merchandise." Consequently he is not entitled to his discharge. His proceedings not being just and fair, as defined by the foregoing act, no relief can be granted to him. In *The Matter of Brady* (reported in 8 Hun, 437) the supreme court of this department at general term, March, 1876, in overruling the order of justice DONOHUE, discharging a prisoner in proceedings like the present, where it was shown that no part of any former estate or property of the prisoner was in the hands of any person, fraudulently or otherwise, except what passed to his assignee in insolvency, nevertheless held that the nature of the debts and the acts for which the judgment were obtained, if his acts were not just and fair, precluded him from applying for the benefit of the act, holding that the necessity of all the prisoners' proceedings being just and fair, applied not to the proceedings upon which the appli-

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cation was made alone, but to those matters in the suit in which the judgment was obtained. This decision was affirmed in the court of appeals (*See ante*, 128).

II. The act in question was created solely for the benefit of poor but unfortunate debtors, and not for the relief of the fraudulent debtor (*Matter of Watson*, 2 *E. D. Smith*, 429; *Gaul agt. Clark*, 1 *N. Y. W. D.*, 209; *In re Walter Brady*, 8 *Hun*, 37; *Matter of Pie*, 10 *Abb. P. R.*, 409; *People agt. White*, 14 *How. P. R.*, 429). In *The Case of Watson* (2 *E. D. Smith*, 429), this court held as follows: "The proceedings of 2 Revised Statutes, 31, which forbids a discharge if the debtor has fraudulently disposed of his property, or in case his proceedings have not been just and fair, contain no limitations as to time; and it is immaterial whether a fraud upon his creditors is perpetrated before the imprisonment in execution or intermediate the arrest and execution." And again, in *The Matter of Pie* (*supra*), the supreme court in this department laid down the rule: "An insolvent is not entitled to his discharge from an indebtedness which arose from his embezzlement of money and evidence of debt, which came to the possession of the prisoner, as a clerk, in the course of his employment."

III. The petitioner has before, under the same statute, applied to a justice of the supreme court of this state for his discharge, and on that application issue was duly joined, a trial had, and after a full hearing the application was denied upon the merits, an order duly entered and served, from which no appeal has been taken, and no application made to open those proceedings or to amend the same. The doctrine of *res adjudicata* applies. The petitioner should have either moved to open these proceedings, or have appealed from the order so entered. He was entitled to such an appeal by the Laws of 1854, chapter 270, page 592 (*Matter of Livingston*, 34 *N. Y.*, 557). *Certiorari* will remove to the supreme court for examination and review (2 *R. S.*, 49, 50; and *Laws of 1874*, chap. 280, sec. 17; *Gardner agt. Commissioners*, 10 *How.*

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Pr. R., 181; *People ex rel. Louis* agt. *J. F. Daly*, 4 *Hun*, 641; *Morewood* agt. *Hollister*, 6 *N. Y.*, 309). The principle of *res adjudicata* applies in cases like the present one (*Demorest* agt. *Day*, 32 *N. Y.*, 281; *White* agt. *Coatsworth*, 6 *N. Y.*, 137; *Yonkers and N. Y. F. I. Co.* agt. *Bishop*, 1 *Daly*, 449; *Powers* agt. *Witty*, 42 *How. P. R.*, 352; *People ex rel. Lockwood* agt. *Akin*, 4 *Hill*, 606). In *Brown* agt. *Mayer*, in court of appeals (13th June, 1876, reported in *Weekly Digest of September 11, 1876, vol. 3, No. 5, p. 119*), held that the date of *res adjudicata* applies not only to judgments, but to all judicial proceedings, whether made in actions or summary or special proceedings, or by a judicial officer in matters properly submitted to their determination. *Matter of Rosenberg* (10 *Abb. [N. S.]*, 450), *Matter of Thomas* (10 *Abb. P. [N. S.]*, 114), are cases in point. If the debtor can make a second application, after being defeated in the first, there can be no limit to the applications, and the creditor may better abandon his claim at once than think of opposing a discharge. Per BRONSON, J., in *People* agt. *Allen* (4 *Hill*, 608). In *The Matter of Andrew L. Roberts*, just decided by the general term of the supreme court of this department (10 *Hun*, 253), the court has expressly decided that an application like the present one is, after the decision of justice DONOHUE, *res adjudicata*. The case of *Roberts* is in all respects identical with the one now before this court. Affirmed in court of appeals (*See ante*, 199).

IV. The copy petition of the applicant is defective in not having attached thereto the usual sheriff's certificate of imprisonment. This is a defect going to the jurisdiction of these proceedings, and as these proceedings are purely statutory, they must be strictly followed, and if any defect occurs therein, it cannot be cured by amendment. *Quære*: Can this court review and reverse an order of the supreme court made in reference to a judgment of the latter court? Certainly not. For the foregoing reasons the present application should be denied, with costs.

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Peter Mitchell, counsel for applicant, argued that the law should be construed according to the intent of the law-making power; that it had been the policy of the law-making power in all civilized countries to reduce the penalties for crimes, and to legislate in favor of the liberty of the citizen. He cited the case of *The Royal Commission*, in 1836, which reduced the then thirty-six death penalties to six, and since that time they have been reduced to two, and in this state the legislature intended to abolish imprisonment for debt, and had so modified previous laws that an application can now be made by an imprisoned debtor as often as he desires; that if it were not so, and if the debtor had no money and no friends to come forward to pay the judgment, and his application were denied, he would have to remain in prison during his natural life, if the doctrine of *res adjudicata* applied, and claiming that the court of appeals had substantially reversed the opinion of the general term in the *Roberts Case*, which had sustained the *res adjudicata* theory.

VAN HOESSEN, J. — The decision of the general term of the supreme court *In the Matter of Andrew L. Roberts*, though not of binding authority in this court, is entitled to so much weight and consideration that I shall follow it and govern my action by it. Where there are in one city three courts of concurrent jurisdiction, good order requires that they shall so conduct their affairs that no one of them shall interrupt or weaken the force of the proceedings and adjudications of either the others. If counsel has discovered new evidence, which establishes the innocence of his client, let him apply to the court which formerly adjudged his client to be guilty of fraud, and he may there obtain leave to present his new proofs. Unless counsel expects the court of common pleas to reverse, modify or make void the decision of the supreme court, I can perceive no reason for making this application to the common pleas instead of applying to the supreme court for leave to renew in that court his former application.

Monarque agt. Requa.

SUPREME COURT.

MARY MONARQUE agt. ELLEN REQUA and others.

Will — construction — void devise.

Where a testator gave the income of his estate to his four daughters, to be divided between them equally "during their, and each of their, natural lives, with remainder to their respective children, and to their respective heirs, it being further provided that if either daughter should die without issue, the share of such deceased daughter should be divided between the survivor or survivors of them, share and share alike, &c.:"

Held, that the testamentary disposition was void, as creating a limitation beyond two lives in being at the testator's death.

Special Term, 1876.

Gideon J. Tucker, for plaintiff.

L. S. Chatfield, for defendant Eliza Monarque.

VAN VORST, *J.* — The plaintiff is a daughter of Jeremiah H. Monarque, deceased, and in and by her complaint claims that the second and third sections of her father's will are illegal and void, as contrary to the statutes of the state of New York, inasmuch as it is thereby attempted to suspend the absolute power of alienation of real estate, and the absolute ownership of personal property, for a longer period than for two lives in being, at the time of the death of her father.

The paragraphs of the will complained of are as follows:

"Second. I give and bequeath the income arising from my estate to my daughters, Ellen Requa, Louisa Dixon, Eliza and Mary, to be divided between them, share and share alike, during their and each of their respective natural lives, and

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remainder to their respective children, and to their respective heirs and assigns forever."

"Third. It is my will, and I do hereby so order and direct, that if either or any of my said daughters shall die without lawful issue, that the share of said deceased daughter or daughters shall be divided between the survivor or survivors of them, share and share alike, and to their children, respectively, as above expressed."

The testator having, by the first paragraph of this will, given to his wife the use of all his real and personal estate during her natural life, the enjoyment and participation of the four daughters in the income, commences with her death.

The effect of the second paragraph of the will is to suspend the absolute power of alienation of the realty and the absolute ownership of the personalty for four lives.

The gift to the four daughters is of the income arising from the testator's estate, share and share alike, during their and each of their lives.

This renders the estate inalienable during the lives of the four children and the survivors of them. The remainder over is to the children and heirs of the four daughters, to take effect in possession, after the death of the last surviving daughter. Such disposition is void. The limitation over after the death of the wife, leaving to the four daughters during their lives, without any separation of the estate into shares, and to continue during the lives of the four, is a limitation clearly beyond the continuance of two lives in being, at the death of the testator, and is void by the statute, leaving the fee to vest immediately in the heirs at law, subject only to the life estate of the wife (3 *Rev. Stat.* [5th ed.], p. 11, secs. 14, 15; *Coster agt. Lorillard*, 14 *Wend.*, 265; *Hawley agt. James*, 16 *id.*, 61). The life estate given to the wife is separate from the other life estates; it does not disturb the continuity of the descent, and is therefore valid (*Savage agt. Burnham et al.*, 17 *N. Y.*, 561; *Kane and wife agt. Gott*, 24 *Wend.*, 641).

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It must, therefore, be determined in this action, that the said decedent died intestate as to all the rights and interests in his property attempted to be devised or bequeathed by the second and third paragraphs of his will, and that the fee and title to said property, attempted to be given thereby, vests immediately in the heirs at law of the testator, subject only to the life estate of the wife, and there should be judgment accordingly.

Matter of Scott.

N. Y. COMMON PLEAS.

In the matter of the accounting of WILLIAM L. SCOTT, assignee of KENYON, COX & CO., and of DAVID DOWS, special trustee, &c.

*Assignee—Accounting—Reference to take and state assignee's accounts—
What compensation to be allowed assignee, trustee and counsel.*

The courts, in the distribution of estates intrusted by law to their administration are, to a great extent, acting for absent creditors or unrepresented parties, who repose, with confidence, upon the judicial care and watchfulness of the courts of their interests. No right exists in such tribunal to sequester the money equitably belonging to others in lavish and injudicious allowances to trustees, or their attorneys or agents, engaged in such administration, or to counsel who appear in the proceeding for distribution, but they are bound to regard every dollar thus appropriated as involuntarily exacted and levied from its lawful owner for the necessary expenses of administration.

Motion to confirm the report of a referee appointed to examine into the accounts of an assignee, which proceeding for such an accounting originated upon the petition of a creditor of the assignor to the extent of some \$134. Upon the return of that application, the assignee obtained an order for a final accounting, and upon the return day the order of reference was made. The referee proceeded to take and state the accounts as required by the order of reference, and as authorized by the amendment to section 4 of the act of 1860 (*chap. 348*), as made by chapter 56 of Laws of 1875. Among other items awarded by the referee, and submitted to the court for its approval, are the following, viz. : *First.* That the counsel for the petitioning creditor, to whom less than \$150 was due, should be paid \$400 for his services. *Second.* That the special trustee, whose accounting was in a measure involved, and whose legal commissions, at the rate allowed by law to executors and administrators, amount to \$3,820.50, should be paid, as a compensation for his services, \$6,000. *Third.* To the assignee, instead of \$11,392.91, his legal commission at the like rate, "should, in consideration of the laborious nature of his duties, and the great skill and fidelity displayed

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by him," be paid the sum of \$40,000; and, *Fourth*, that the attorneys for the assignee, for services rendered by them *in the matter of the accounting*, "and preparation of reports of proceeding, petitions, for general citation, issue and service of same, and attendance in court and before referee," should (in addition to \$1,000 theretofore paid them by the assignee, and allowed for counsel fee in the matter of the assignment) be paid the further sum of \$10,000.

Held, first, that as to the items in the claim for the petitioning creditor (whose debt is less than \$150) to an allowance of *four hundred dollars*, there is no law or principle of justice accepted or acted upon by the courts which justify any such award to him out of these trust funds.

It does not appear that, in regard to the claim of the petitioning creditor, there was any dispute before the referee in respect to it which required a trial before him, and the proceeding he instituted was superseded by the intervention of the assignee under claim of right to a final accounting, and with it the claim of this creditor, so far as appears, was recognized without question or contest.

The proceeding he instituted is styled "special," and no costs or rate of counsel fee is provided by law otherwise than on an allowance of such taxable costs or allowances as are prescribed by the Code (*sec. 309*). They can only be awarded to a successful party, and in such case it is the duty of the court to determine which party shall pay the same, and in the absence of any other provisions of law, the rate fixed by the Code in analogous cases should govern.

Held, second, that as to the claim of the special assignee or trustee to the allowance of \$6,000, instead of his legal commissions, it must also be denied. There is no provision or principle of law that permits any increase of the allowance to such trustee beyond the statutory compensation made to executors and administrators.

Held, third, that as to the claim of the general assignee to \$40,000, instead of his legal commissions, the same rule applies, and he should be allowed the same commissions which are by statute allowable to executors and administrators, and his allowances should be restricted to those rates. Although the law exacts the most conscientious discharge of his duty, nothing can be allowed beyond such statutory allowance under claim for excess of zeal, or assumption of more onerous duties than might have been exacted.

Held, fourth, that as to the claim of the attorneys and counsel of the assignee to an allowance of \$10,000 for the conduct of the proceedings upon the accounting, in addition to the sum of \$1,000 allowed and paid them as a fee in the course of the administration of the assigned estate, the case is not so intricate as to warrant its payment.

The simple employment of such officers of the law to aid an assignee having \$1,000,000 to administer does not necessarily, or by any just

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deduction from the magnitude of the sums, entitle them to any increased compensation for their services beyond what might be allowed to a like employment of a clerk or other assistant, or to any such engagement where the fund was small in amount.

The services rendered by attorneys and counsel in such cases are to be remunerated according to a fair and reasonable estimate, as in any other ordinary cases of employment; and the amount can have no just dependence for its estimate of value upon the extent or character of the fund to be administered.

The character and quality of professional skill that the necessity of the case requires to be employed, and its general values, are to be considered by the court in passing upon an allowance asked for.

In cases where the aid of counsel are both proper and necessary, the claim on the part of the trustee to an allowance is not one addressed to the mere discretion or arbitrary will of the court, but must be predicated upon competent evidence for its action.

In the settlement of the accounts of a trustee, no allowance (beyond probably that for some clerical duty) can be made for the preparation, proper keeping and presentation of his accounts in a clear and explicit manner, and with all necessary proofs to sustain it. Such duty he, in law, engages as a part of his *personal* trust, and he cannot, in respect to it, exact any expense for employing counsel to instruct him in his own legal duty, unless some complications or unusual or unforeseen difficulties have arisen rendering such employment of counsel necessary and proper.

At Chambers, September, 1877.

ROBINSON, J. — The present motion is made upon the report of Stephen H. Olin, referee, appointed under an order dated May 25, 1877, whereby the accounts of said William L. Scott, assignee of Kenyon, Cox & Co., and also the account of David Dows as special trustee, and the vouchers, were referred to him to take and state the same.

The proceeding for such accounting originated upon the petition of John F. Tracy, a creditor of the assignors, to the extent of some \$134. Upon the return of that application, the assignee obtained an order for a final accounting and the issuing of a citation to the creditors, and on proof of due service upon the creditors personally, or by publication on the return day, the order of reference to Mr. Olin was made.

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The proceedings of the assignee appear to have been regularly conducted throughout, none of the creditors having intervened in the matter to make any opposition to the proceedings or accounts of the assignee on the accounting.

The referee proceeded to take and state the accounts as required by the order of reference, and as authorized by the amendment to section 4 of the act of 1860 (*chap.* 348), as made by chapter 56 of Laws of 1875. No objection is now made by any creditor to the proceedings of the assignee, or to any item of such statement of their said accounts, as thus settled by the referee. Pending the proceedings before the referee commenced under the act of 1860 and its amendments, the act of June 16, 1867 (*chap.* 466), repealing and superseding it had gone into effect, by section 28 of which any proceeding thereafter had or pending under the previous acts was to be continued under its provisions. Otherwise, as a repeal of the former act, it went into immediate effect. It constituted this court (*sec.* 25), in respect to such assignments, a court of general jurisdiction, affirming and continuing (*sec.* 20, *sub.* 3) the power to appoint a referee to take and state an account of the assignee. Whatever matter that officer has assumed to consider, or to suggest for the consideration of the court beyond taking and stating the account of the assignee, as to receipts and disbursements actually made by him, and his settlements of commissions as established by law (none other having been referred to him), was in excess of any power conferred upon him; and any additional suggestions made by him are entitled to respectful consideration as emanating from one in whom confidence had been placed by the court. Such, however, as are contained in his report, and which the counsel for the petitioning creditor and of the assignee submit for approval in a proposed order or decree, contain some matters that occasion serious ground for question as to the propriety of their recognition. First, that the counsel for the petitioning creditor, to whom less than \$150 was due, should be paid \$400 for his services in this matter; second, that

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Mr. Dows, the special trustee, whose accounting was, in a measure, involved, and whose legal commissions, at the rate allowed by law to executors and administrators, amount to \$3,820.50, should be paid, as a compensation for his services, \$6,000; third, that the assignee, William L. Scott, instead of \$11 392.91, his legal commissions at the like rate, "should, in consideration of the laborious nature of his duties, and the great skill and fidelity displayed by him," be paid the sum of \$40,000; and fourth, that Tracy, Olmstead and Tracy, the attorneys and counsel for the assignee, for services rendered by them "*in the matter of the accounting*, including supervision and preparation of reports of proceeding, petitions for general citation, issue and service of same, and attendance in court and before referee, should" (in addition to \$1,000, theretofore paid them by the assignee, and allowed for counsel fee in the matter of the assignment) "be paid the further sum of \$10,000." These claims are in each instance startling, from the large amounts proposed and claimed as compensation for the services rendered, and suggest the acquisition of fortunes of *thousands* of dollars in the happy accident of an employment in the course of the execution of such an assignment. They strike me as excessively exorbitant, and the recommendation of the referee fails to meet my approval or confirmation. The courts, in the distribution of estates intrusted by law to their administration, are, to a great extent, acting for absent creditors or unrepresented parties, who repose with confidence upon the judicial care and watchfulness of the courts, of their interests. No right exists in such tribunals to sequester the money equitably belonging to others, in lavish and injudicious allowances to trustees, or their attorneys or agents, engaged in such administration, or to counsel, who appear in the proceeding for distribution, but they are bound to regard every dollar thus appropriated as involuntarily exacted and levied from its lawful owner, for the necessary expenses of administration. As to that item in the claim, presented by counsel for the petitioning creditor (whose debt is less than \$150) to an allow-

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ance of *four hundred dollars*, there is no law or principle of justice, accepted or acted upon by the courts, which justify any such award to him out of these trust funds. The courts are not the almoner of such assigned estates (*Devin agt. Perrine*, 26 *N. Y.*, 441-449), and while the act of 1877 (*chapter 466, section 26*), authorizes the court to "award reasonable counsel fees and costs, and to determine which party shall pay the same," it does not countenance any idea that the court may distribute otherwise, out of its own motion, any part of the fund of the estate, under the name of *counsel fees*, to such counsel as have appeared and taken part in its administration (*Noyes agt. Children's Aid Soc.*, 53 *How.*, 10), or to dispense therefrom its favors, according to their appreciation or estimate of the merits or value of counsel of their services, or to act otherwise than upon satisfactory evidence to sustain any allowance it may make. It does not appear that in regard to the claim of the petitioning creditor there was any dispute before the referee in respect to it, which required a trial before him, and the proceeding he instituted was superseded by the intervention of the assignee, under claim of right to a final accounting, and with it the claim of this creditor, so far as appears, was recognized without question or contest. Nothing in the act contemplates the allowance of any costs or counsel fees in the case of a claim thus presented and recognized, "*sub silentio*," or the payment out of the trust fund, or by the assignee personally, of counsel fees, or costs where there was no contest or dispute, or for the preparation or service of a petition that the assignee be called to an account.

Had the assignee been derelict in his duty, or unconscientiously disputed the debt, some equitable ground would have existed upon which a claim might be made for awarding to the successful litigant counsel fees and costs, either personally against the assignee or out of the trust funds. The proceeding he instituted is styled "*special*," and no costs or rate of counsel fee is provided by law otherwise than on an allowance of such taxable costs or allowances as are prescribed by

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the Code (*Sec. 309; Laws of 1854, chap. 270; Noyes agt. Children's Aid Soc., 53 How., 10*). They can only be awarded to a successful party, and in such a case it is the duty of the court to determine which party shall pay the same (*act 1877, sec. 26*), and in the absence of any other provisions of law, the rate fixed by the Code in analogous cases would govern.

The court cannot otherwise speculate as to what allowances should be made for counsel fees on any vague principles arising out of any supposed "*quantum meruit*;" and no costs or counsel fees are prescribed by the Code for mere service of a petition and order to show cause. This claim, made on behalf of the petitioning creditor, must be denied.

As to the claims made on behalf of Mr. Dows, the special assignee, of \$6,000 instead of \$3,820.50, his legal commissions, and of Mr. Scott, the general assignee, to \$40,000 instead of \$11,392.91, they must also be denied.

There is no provision or principle of law that permits any increase of their allowances beyond the statutory compensation made to executors and administrators. The law so far condemns such extra allowances to assignees for the benefit of creditors that an authority in the assignment to return them would render it void as to dissenting creditors. The acceptance of the execution of a trust, in cases where no fee or compensation is allowed by law, is "gratuitous." "A trustee may not profit by his trust" (*Robinson agt. Pell, 3 Pr. Wm., 132*). *Prima facie*, and under the most favorable decisions of our courts, he becomes entitled only to such compensation as is allowed to executors and administrators (*Meacham agt. Stearns, 9 Paige, 398; Duffy agt. Duncan, 35 N. Y., 187; Ogden agt. Murray, 39 id., 202*); he is not entitled to compensation for personal trouble or loss of time (*Brockshop agt. Barnes, 5 Mad., 90*), and, "in general, his position is honorary and a burden upon his honor and conscience, and not one assumed upon mercenary views" (*Ayliffe agt. Murray, 2 Atk., 58; Green agt. Winter, 1 John. Ch., 37*). Although

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the law exacts the most conscientious discharge of his duty, nothing can be allowed beyond such statutory allowance under claim for excess of zeal, or assumption of more onerous duties than might have been exacted. In confirmation of the settled principle as announced in the cases in our own courts, above cited, the court of appeals, in *The Matter of Edward Schell* (53 N. Y., 262), say: "It is the settled rule of the court, in cases where the creator of the trust has made no provision for compensation to the trustee, the courts have, by analogy, allowed the same commissions which are by statute allowable to executors and administrators, and have restricted the allowances to those rates." These authorities are decisive upon the claims of the assignee to extra compensation. There are further and other considerations in respect to the claim of their attorneys and counsel to an allowance of \$10,000 for the conduct of these proceedings upon the accounting, in addition to the sum of \$1,000 allowed and paid them as a fee in the course of the administration of the assigned estate.

The simple employment of such officers of the law, to aid an assignee having a million dollars to administer, does not necessarily, or by any just deduction from the magnitude of the sum, entitle them to any increased compensation for their services, beyond what might be allowed to a like employment of a clerk or other assistant, or to any such engagement where the fund was small in amount. The service rendered is to be remunerated according to a fair and reasonable estimate, as in any other ordinary cases of employment, and the amount can have no just dependence for its estimate of value upon the extent or character of the fund to be administered.

The employment in matters involving large sums, confer no right to any "*honorarium*" or gratuity, but is to be compensated for, upon legal evidence of such proper compensation as is due to the particular service.

The character and quality of professional skill that the necessity of the case requires to be employed and its general values, are to be considered.

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The assertion, by the highly respectable counsel in the present case, of a claim to such a fee as \$10,000 for conducting the reference, I must, however, upon the evidence offered to support it, regard as not warranting its allowance or payment. The only evidence offered to support it is the deposition of Rufus F. Andrews, Esq., a counselor at law, who testifies in substance that "he has knowledge of the amounts customarily allowed to the attorney and counsel for the assignee in such matters; that he has informed himself, by examination of the papers and records in this case, including the accounts of Mr. Dows, the special assignee, of the amount of work and labor required in the preparation thereof, and of personal attention of counsel requisite thereto." And in view of the amount of the assigned estate, he testifies the account of Tracy, Olmsted & Tracy, claiming said sum for their services, in his judgment, is within the rate ordinarily allowed in like cases, and in fact less than has been allowed frequently "to his knowledge." In what courts, or by what judicial officers with whose action Mr. Andrews asserts familiar knowledge, such very large sums have been allowed counsel, he fails to disclose. Precedents, of the character to which he alludes, are unknown to this court and cannot, if otherwise shown, be accepted as examples to be followed by it.

The proceeding for the settlement of an account of an assignee partakes of nothing of a recondite or intricate character. It is ~~is~~ one that in the ordinary course of proceeding is more mechanical than professional, and does not exact any higher degree of professional skill than may be expected in a respectable clerk or a mere tyro in the profession, unless some questions of intricacy and legal difficulty arise. In every case it undoubtedly needs the supervision of one acquainted, to some degree, with ordinary legal principles, and when objections are interposed or controversies arise, the aid of counsel may be both proper and necessary.

In such cases the claim, on the part of the trustee to an allowance, is not one addressed to the mere discretion or arbi-

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trary *sic vols* of the court, but must be predicated upon competent evidence for its action. While his own acts as trustee, and the counsel he may employ, are to be subject to the control of the court, the allowance made him must be one for an expense necessarily incurred in the execution of the trust, and allowable, by way of indemnity, to him therefor. But in the settlement of the accounts of a trustee no allowance (beyond probably that for some clerical duty) can be made for the preparation, proper keeping, and presentation of his accounts in a clear and explicit manner, and with all necessary proofs and vouchers to sustain it. Such duty he, in law, engages as a part of his *personal* trust, and he cannot, in respect to it, exact any expense for employing counsel to instruct him in his own legal duty, unless some complication or unusual or unforeseen difficulties have arisen rendering such employment of counsel necessary and proper.

The necessity for the incurring of any expense by a trustee is ordinarily dependent upon the question whether it was one for which a prudent man would have occasion to become liable in the management of his own affairs. Except the documentary evidence afforded by accounts that have been prepared and settled, the papers and petitions used in the course of this proceeding furnish no satisfactory evidence tending to establish what would be a reasonable charge to be made by the attorneys and counsel of the assignee for their services upon the accounting, and the deposition of Mr. Andrews is entirely unsatisfactory as evidence to establish that any such sum as \$10,000 was just or fair as compensation therefor, or to enable the court to fix it in any other sum. The largeness of the amount received and disbursed or held for disbursement by the trustee furnishes the court with no such data, nor any basis for any allowance of any greater sum than such as might be awarded upon the most ordinary accounting. The care and management necessary to the complete administration and distribution of a large fund is legally compensated in the increased commissions to the trustee, but in the employ-

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ment of necessary aid and assistants, and the incurring of expenses therefor, it only affords occasion for more frequent employment of the labor and services necessary to, and in aid of, the execution of the trust.

The value of the advice of counsel as to the proper mode of protesting a foreign bill of \$10,000 is not greater than as to one of \$1,000, nor are the services of one of pre-eminent public reputation greater than those of the humblest member of the profession, who is possessed of the learning, skill, and ability required by the occasion, and which is necessary and proper for judicious and successful action. For illustration, a blacksmith may chance to successfully cut off a limb, but such use of his skill cannot compare in value with that of a surgeon learned and skilled in the knowledge of every art and artifice which would insure precise and safe action in such operation.

Nor would the most eminent mechanical engineer, if he condescended to repair a watch, be entitled to any greater compensation therefor than any skillful watch repairer.

These allusions to principles, upon which the skill and ability of one employed to perform a service is to be compensated, are referred to simply by reason of the large sums involved in these proceedings; the respectability and eminence of the attorneys and counsel who have been engaged by the assignee to supervise his accounts, and a lack of what I regard to be the principles upon which the value of their services therein should be estimated in the allowance of the sum of \$10,000, reported as one proper to be paid therefor out of the trust fund. The case, in this respect, must be again sent back to a referee, and (as Mr. Olin is absent from the country) I direct a reference to the Hon. Joseph S. Bosworth, requiring, first, a presentation to him of a particular and detailed statement of the services rendered by the attorney and counsel for the assignee of their services on this accounting for which such compensation is claimed, and any proof they may offer in support thereof; and, also, that the referee cite, or cause to be

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cited, before him and examined at least four of such members of the legal profession as he may deem proper to give testimony upon the subject of such compensation, and that he report the proofs so taken, with his opinion thereon, with all convenient speed.

Any allowances to the petitioning creditor and to the special and general assignee, beyond the legal commission of said assignees upon the rates granted executors and administrators, are denied.

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SUPREME COURT.

ALBERT L. HELMBOLD agt. THE HENRY T. HELMBOLD
MANUFACTURING COMPANY.

Trade-mark — Individual name — right to, not affected by bankruptcy proceedings — Evidence to establish the decree or judgment of one court in another.

A court of equity will refuse to interfere in behalf of persons claiming property in a trade-mark where such person is shown to be advertising his wares under representations which are false. He is entitled to no protection in a business carried on by means of untrue representations and statements. An order of a court should not suppress the publication of the truth and allow the utterance of a falsehood (*See, to same effect, Seabury agt. Grosvenor, ante, 192*).

Where the plaintiff undertakes to sell his compound, not only under the name and alleged trade-mark which Henry T. Helmhold formerly used, and which he still claims to use under and through the corporation with which he is now connected, but upon a representation that said Helmhold superintends, personally, its manufacture, and by his own signature certifies to the genuineness of each bottle:

Held, that this is clearly and confessedly false, and the plaintiff is entitled to no protection in a business carried on by means of such untrue and false representations.

A trade-mark must, as the term imports, be one consisting of a word, an expression, a device or a mark invented or adopted by the owner which designates and distinguishes his production from the general manufacture of the same article, and it cannot be the appropriation of words belonging to the general public which describe truly a known product.

A particular process of manufacture may be owned when the legal steps to acquire such ownership have been taken, or a particular mark or name designating the manufacturer may by use become the subject of protection, but words and phrases in common use, describing truly an article offered to the public, cannot become individual property any more than those generally employed in life which must be used to make speech intelligible.

Personal knowledge and the right to use words truly descriptive of things

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cannot, by legal process, be taken from an individual against his will, and without his voluntary surrender and assignment thereof.

Although a person can by voluntary sale and assignment transfer the right to use his knowledge and name, the right to use his own knowledge and name cannot be taken from him through the order of a bankrupt court, or by any other judicial proceeding whatever.

The name of a man is a part of his being, so indissolubly connected with and attached to him, and which distinguishes and separates him from all mankind, and enables the public to know him and that which he has prepared; it cannot be taken from him and given to another, so that the latter, by the use of such name, may vend and sell his own preparations as if they were those of the former.

The decree or judgment of one court cannot be shown in another by the oral statement of a witness; the record, or an exemplified copy thereof, must be produced.

At Chambers, September, 1877.

APPLICATION to restrain the defendant from the use of an alleged trade-mark.

Ira D. Warren, for plaintiff and motion.

George M. Curtis, for defendant and opposed.

WESTBROOK, J. — It is conceded that Mr. Henry T. Helmbold was the original manufacturer of an article known as "H. T. Helmbold's Highly Concentrated Compound Fluid Extract of Buchu," and that he continued such manufacture for many years. On the 13th of September, 1872, the said Helmbold was declared and adjudicated a bankrupt, and on the fourth day of November of the same year an assignee in bankruptcy of his estate was appointed. Under the order of the bankrupt court, the plaintiff claims that the title to, and right to use, the name "H. T. Helmbold's Highly Concentrated Compound Fluid Extract of Buchu," in the manufacture and sale of the compound which had been acquired by said Henry T. Helmbold through use, became vested in such assignee, who, in turn, transferred it to the plaintiff.

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The plaintiff further claims that from the year 1862 up to the 5th day of March, 1873, he manufactured the preparation which bore the name hereinbefore stated for his brother, Henry T. Helmbold, and for the assignee in bankruptcy, and since that date he has manufactured it on his own account, using the aforesaid name and the labels and wrappers which had been used by the said Henry T. Helmbold.

The wrapper or label around the bottle containing the preparation which the plaintiff vends, in addition to the name indicating the article to be that of H. T. Helmbold, also states as follows: "None genuine unless signed H. T. Helmbold." "Principal depots for the sale of Helmbold's genuine preparations at Helmbold's Temple of Pharmacy, Continental Hotel and Helmbold's Medical Depot, 101 South Tenth street, Philadelphia, Pa." "Remarks — The quality and purity of these preparations is guaranteed by the reputation acquired in many years' experience, and close attention to business, and the confidence and liberal patronage of the medical faculty and the public. Both the fluid and other extracts have been admitted to use in the United States army, and in all the State hospitals and public sanitary institutions, as well as in private practice, are in general demand as invaluable remedies." "Directions for using Helmbold's genuine preparations inside, printed in English, French, German and Spanish."

It will be observed that the effect of the label, as used by the plaintiff, is to assure the public that the preparation put up by him, and which he charges to be "a useful and valuable article," is not only the original medicine manufactured by H. T. Helmbold, but that it is also prepared under the latter's personal supervision, and its usefulness and efficacy are guaranteed by his personal reputation and experience.

The defendant is a manufacturing company organized under the laws of this state, of which Henry T. Helmbold, the original compounder of the medicine which is the cause of dispute between the parties to this action, was, and is, one of

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the copartners, and such company, by the aid and concurrence of said Henry T. Helmbold, manufactures and puts up for sale an article also called "Henry T. Helmbold's Highly Concentrated Compound of Fluid Extract." Whilst the preparation of the defendant has the same name with that of the plaintiff, and its sale and use are recommended by printing upon the wrapper the same arguments and reasons which the plaintiff's wrapper contains, yet such printing is in carmine ink, and it professes not to be manufactured by the plaintiff, or at his establishment in Philadelphia, but by the defendant in the city of New York.

No attempt has been made by the defendant to vend its article as that manufactured by the plaintiff, but, on the contrary, the plaintiff complains that the defendant has warned the public against the preparation of the plaintiff, upon the alleged ground that it was not compounded according to the original Helmbold receipt. The answer is verified by Henry T. Helmbold, who has also made the principal affidavit in opposition to the injunction asked for by the plaintiff.

Upon the facts which have been detailed, the first clear and conclusive answer to the application of the plaintiff for the injunction restraining the defendants from using the name given to its preparation is, that the plaintiff's label is untrue, and the effect of granting the relief asked for would be the issue of an order of the court prohibiting the use of a name and a wrapper, which states the truth, for the benefit of one who uses a name and wrapper which convey an untruth.

If what the plaintiff states upon the wrappers of his bottles containing the medicine, and which has been hereinbefore set forth is remembered, it will appear, as has also been stated, that he undertakes to sell his compound, not only under the name and alleged trade-mark which Henry T. Helmbold formerly used, and which he still claims to use under and through the corporation with which he is now connected, but upon a representation that said Helmbold, super-

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intends, personally, its manufacture, and by his own signature certifies to the genuineness of each bottle. This, clearly and confessedly, is false, and the plaintiff is entitled to no protection in a business carried on by means of untrue representations and statements.

As Henry T. Helmbold is personally employed with the defendant, and whatever value his personal care and supervision give to the defendant's business fairly belongs to it, and not to the plaintiff, an order of court should not suppress the publication of the truth and allow the utterance of falsehood.

Whilst, for the reason, then, just given, the injunction asked by the plaintiff must be refused, it seems equally clear that the plaintiff acquired no title whatever to the so-called trade-mark by the proceedings in bankruptcy.

It is not denied that Henry T. Helmbold could, by voluntary sale and assignment, transfer the right to use his knowledge and name, but it is not seen how the right to use his own knowledge and name can be taken from him by any judicial proceeding whatever. If they can be, then the merchant who has become unfortunate, but who has still a knowledge and a name with which to begin business anew, must, if he has been adjudged a bankrupt, be content to leave with his assets his brains and his character.

This is no over-statement of the case, as the argument which follows will, we think, make manifest. Admitting that the plaintiff has the secret of the compound, which was once Henry T. Helmbold's alone (this, however, the latter most expressly denies), did the decree of the bankrupt court transfer the sole right to use it to the assignees in bankruptcy and thence to the plaintiff? This will not be claimed; neither is it pretended that the mixture is not, in fact, what its name declares, "A Fluid Extract of Buchu," the right to make which and to declare by plain words in common and general use the character of the mixture, must, in the absence of a patent protecting the process of manufacture, belong to any

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one able to make the article, and who desires to utilize his knowledge by its preparation and sale. For example : A could not compound a fluid extract from coffee, and, after its introduction to the public as such an article, prevent B, who has the knowledge and skill necessary to produce a similar extract, from using such knowledge and skill, and from employing suitable and ordinary words to inform buyers truly as to its nature. If B can, in such a case, be enjoined, then language in general use to express thought and to convey information can be appropriated, and any one will then be able to own words which are now the common property of all English-speaking people. A trade-mark must, in a case like this, as the term imports, be one consisting of a word, an expression, a device, or a mark invented or adopted by the owner, which designates and distinguishes his production from the general manufacture of the same article, and it cannot be the appropriation of words belonging to the general public which describe truly a known product. As before stated, a particular process of manufacture may be owned when the legal steps to acquire such ownership have been taken, or a particular mark or name designating the manufacturer may, by use, become the subject of protection ; but words and phrases in common use, describing truly an article offered to the public, cannot become individual property any more than those generally employed in life which must be used to make speech intelligible.

Assuming, then, that personal knowledge and the right to use words truly descriptive of things cannot, by legal process, be taken from an individual against his will, and without his voluntary surrender and assignment thereof, what remains of the plaintiff's case ? To a preparation of buchu, which was a drug well known by that name, Mr. Henry T. Helmbold had given his own name as the compounder thereof. This was its only distinctive feature. The remainder of the so-called trade-mark consisted of words descriptive of the compound, as much so as "extract of sugar" or "extract of lemon"

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would describe what was really the extract of either. Of the right to use his own name in such a preparation, can he be deprived?

When applied to his own personal compound, his name simply identifies his own goods. If any other person assumes it in a similar manufacture, the law would protect him, because the public is deceived and he is injured. The imposition and the injury enjoined come from the employment, not of a mere mark the property of another, but from the direct appropriation of a name identifying a man and his own, to whom and his it can alone be applicable. The name of a man is a part of his being, so indissolubly connected with and attached to him, that we fail to see how the one which distinguishes and separates Henry T. Helmhold from all mankind, and enables the public to know him and that which he has prepared, can be taken from him and given to another, so that the latter, by the use of such name, may vend and sell his own preparations as if they were those of the former. If this can be done, then the law and the courts not only enable the quack and the adventurer to impose their compounds and manufactures upon the public under the disguise and cover of an honored name, but they have, with the property of the unfortunate bankrupt, also appropriated and transferred his knowledge, skill, and reputation. Is this the policy of our bankrupt statutes? If it is, then, instead of being a mode of relieving the debtor class, as well as a source of protection to their creditors, every bankruptcy statute is a grave, in which every hope and aspiration of the future of him who can be subjected to its operation must be forever buried. Hitherto the unfortunate being whose property has been swept away by the vicissitudes of business, has supposed his knowledge and reputation were still left to him as a capital for a new beginning. That resource is now also gone, if the plaintiff in this cause is right in his claim, and the future of the bankrupt is shrouded in a darkness so thick and gloomy that not a single ray of light is left to relieve its horrors. To the soundness of such a result this

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court is unable to subscribe. The name of Henry T. Helmbold must still belong to him, to whom his parents gave it. No law and no court can take it from him. The property which he had acquired belongs to his creditors, but the name and whatever of character, good or bad, belonging to it, and which he has himself made, are his, and must so continue to be until he voluntarily parts with them. He has the right to make any extract he pleases, and to tell the public by the use of his own name that the preparation is his, and not that of another, and neither the plaintiff nor any other person can place that name upon a preparation not his, against his will, and deprive him of the use thereof. Such act would not only impose upon others, but would also be so cruel and outrageous toward him that, as it seems to me, no law and no court could justify it.

The principle that a manufacturer can apply his own name to his own creation was fully recognized by the court of appeals in *Meneely* agt. *Meneely* (62 N. Y., 427). Though it was conceded that the plaintiffs in that cause had succeeded to the business of the original manufacturer (Andrew Meneely) of the famous Meneely bells, it was held that the defendant had the right to call all the bells made by him by his own name (Meneely), provided he did not so use that name as to make the public believe that his bells were constructed by the plaintiffs. Such a use of his own name is all that Henry T. Helmbold claims, and it is just such a use which the plaintiffs would prevent and enjoin. The former does not seek to impose upon the public his own mixture by giving them to understand that it is the preparation of the latter; on the contrary, he most carefully notifies the world that he, through the company which bears his name, and with which he is actively connected, and not the plaintiff, manufactures the article which he offers for sale. Unlike the defendant in *Croft* agt. *Day* (7 Beavan, 84), and in other cases to be found, he sails under no false colors, to the injury of the public and the plaintiff, but plainly hoists his own, distinctly proclaiming

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that the preparation offered is his, and not that of the plaintiff. Indeed, so loudly and publicly has this proclamation, by means of advertisements, been made, that one of the grounds of complaint which the plaintiff has strenuously urged is, that Henry T. Helmbold is causing the world to believe that he, and not the plaintiff, is that individual. In fact, this cause is the exact opposite of *Croft agt. Day*, for while in that the complaint was that the defendant was causing the world to believe that he was the original Day & Martin, the famous blacking manufacturers, which was false, the complaint in this is that the original and genuine Henry T. Helmbold will not allow the plaintiff falsely to assume that individual's name, and thus enable him (the plaintiff) to impose upon the public. If a case founded upon such a position has either soundness or justice to commend it to the equitable power of this court, the discovery thereof has not been made by the judge to whom it was presented.

With the discussion of one other proposition, which the plaintiff has incidentally thrown into the argument, this opinion will close. He says that H. T. Helmbold has been adjudged by the courts of a sister state to be a lunatic, and that he has but recently escaped from actual confinement as such. That he is a lunatic, in fact, the defense and the party so declared to be insane emphatically deny. If Henry T. Helmbold be really insane, such condition has not been shown. If the decree of the Pennsylvania court could establish his insanity conclusively to this tribunal, the effect thereof, if so established, need not be considered, for no order or judgment of that state has been proven. In an affidavit to be used upon a motion, as in testimony to be offered upon a trial, a fact can be established by legal evidence only. The decree or judgment of one court cannot be shown in another by the oral statement of a witness, the record, or an exemplified copy thereof, must be produced. This is an elementary rule, and cannot be departed from now. Were such record, or a duly authenticated copy, produced, if any can be

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obtained, perhaps it might appear that the proceedings were irregular and invalid. At all events, as there is no proof upon which the court can act establishing an adjudication elsewhere, its effect need not be considered.

For the reasons stated, the application of the plaintiff for an injunction must be denied, with costs.

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SUPREME COURT.

SIEGFRIED LOWENSTEIN *et al.* agt. AUGUSTE FLAURAUD *et al.**Assignment executed under a power of attorney — acknowledgment by attorney in fact.*

A general assignment for the benefit of creditors, executed and acknowledged by a *resident partner* in person for himself, and also executed in the name of a *non-resident partner* through and by his attorney in fact, is a valid one, and is sufficiently executed (BRADY, J., *dissenting*).

This is especially so when the absent partner, before his departure for Europe, authorized his father, who was his partner in business, to make any disposition of the assets and property of the firm for the benefit of its creditors that he might deem proper. The assignment in such case is a valid one, both upon the ground that it was made by one partner with the consent of the other, and also that it was duly executed by the absent partner through and by his attorney in fact.

The instrument having been executed and acknowledged in due form by the *resident partner*, with the assent and authority of the *absent one*, was a valid assignment of the partnership effects for the benefit of the creditors independently of the execution thereof by the other partner.

An assignment having been executed by an *absent partner* by his attorney in fact, acting under the power of attorney which had been duly executed and acknowledged by him, an acknowledgment made by the attorney in fact, is sufficient under the requirements of the statute (*Laws of 1860, chap. 888*).

General Term, First Department, May, 1877.

APPEAL from order of the special term denying motion for injunction.

Rastus S. Ransom, for appellant.

Albert Cardozo, for respondents

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DAVIS, P. J. — It is well settled in this state that one copartner cannot, by virtue of his power as such partner, make an assignment of the copartnership effects to a trustee for the benefit of the creditors of the firm (*Welles* agt. *March*, 30 *N. Y.*, 344; *Robinson* agt. *Gregory*, cited in opinion of *WRIGHT, J.*, in *Welles* agt. *March*); but one copartner can make such an assignment with the authority of the other partner or partners, and such authority may be implied from circumstances, or acts of the partner or partners not joining in the execution of the assignment. In *Welles* agt. *March*, one of the partners left the city of New York, leaving a letter to his partner, in which he said, "I hereby assign you my interest in the business of Nace & Co. and Nace & Reigniers. Take charge of every thing in our business; close it up speedily." This was held, by the court of appeals, sufficient to confer power upon the remaining partner authority to execute an assignment on behalf of the firm, and the assignment was upheld. In *The National Bank* agt. *Sackett* (2 *Daly*, 397), one of several partners had absconded, and the court held that his act, in absconding and leaving the business in the possession of his copartners, was one clearly implying his consent to the disposition which his partners subsequently made of the remaining effects for the benefit of the creditors. In *Power* agt. *Myers* (43 *Barb.*, 509), it was held that the absconding of a partner implied the power to remaining partners to make a general assignment. In *Baldwin* agt. *Tynes* (19 *Abb. Pr.*, 32), where one partner had left the city and telegraphed to his copartner to make an assignment, the court held the assignment made by his copartner good. In *Dow* agt. *Bough* (36 *How. Pr.*, 479), it was held that an assignment executed by a resident partner, in person, and his attorney in fact, for a non-resident partner, was valid.

It necessarily follows that if the assignment be valid when made by one partner under an implied authority, it must certainly be so when made by express authority.

In this case the partnership was composed of Auguste

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Flauraud and Eugene Flauraud, under the firm name of Flauraud & Son, carrying on business in the city of New York. Eugene Flauraud left New York for Paris before the making of the assignment. The firm was then under some embarrassment, and before his departure Eugene, who was the son of the other partner, in substance, authorized his father to make any disposition of the assets and property of the firm for the benefit of its creditors that he might deem proper; and he also left a power of attorney, bearing date the third of October, and duly executed and acknowledged, by which he constituted and appointed Nathan Metz his attorney in fact, with power to sign and execute all papers and instruments in connection with the business of Flauraud & Son, and especially to sign, seal, execute and acknowledge, and join with his copartner in signing, sealing, executing and acknowledging any transfer, assignment, or general assignment, for the benefit of the creditors, of his interest in the property and assets of the said firm of "A. Flauraud & Son." This instrument was very broad in its language and scope, and, gave, so far as it could lawfully be done, every power requisite to the execution of a general assignment. On the eighth of November following the assignment in question was made. It was executed by Auguste Flauraud, and duly acknowledged; it was also executed in the name of Eugene Flauraud by Nathan Metz, his attorney in fact. It appears that Auguste Flauraud immediately telegraphed to his son at Paris that the assignment had been made, and received in reply a letter recognizing the assignment.

We think there can be no doubt that the assignment was, under these circumstances, a valid one, both upon the ground that it was made by one partner with the consent of the other, and also that it was duly executed by the absent partner through and by his attorney in fact. The question is made that the acknowledgment of the assignment was not in conformity to the requirements of the act of 1860 (*Laws of 1860, chap. 388*). That act requires that such an assignment shall

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be in writing, and shall be duly acknowledged by an officer entitled to take acknowledgments of deeds, and that the certificate of the acknowledgment shall be duly indorsed upon the instrument before the delivery thereof to the assignee or assignees therein named. It was held in *Hardman agt. Bowen* (39 *N. Y.*, 196), that the acknowledgment required by the statute must be made before the title to the assigned property will become vested in the assignees, and it is therefore claimed that the acknowledgment in this case, so far as it relates to Eugene Flauraud, was invalid, because made by his attorney in fact, who executed the assignment in his name. We think there are two answers to this objection. First, that the instrument having been executed and acknowledged in due form by Auguste Flauraud, with the assent and authority of his copartner, was a valid assignment of the partnership's effects for the benefit of the creditors independently of the execution thereof by the other partner; and second, we are of opinion that, the assignment having been executed by Eugene Flauraud by his attorney in fact acting under the power of attorney which had been duly executed and acknowledged by him, the acknowledgment made by the attorney in fact was sufficient under the requirements of the statute.

The statute does not say, in express terms, that the assignment shall in all cases be acknowledged by the assignor himself, but simply that it shall be duly acknowledged before an officer authorized to take acknowledgments of deeds; and it is an established principle of law that where power to execute a deed or other instrument is conferred upon an attorney in fact by an instrument duly acknowledged, such an attorney may perform every act requisite to make the instrument a valid and effective one for the purpose for which it is made. We fail to see any good reason for saying that the instrument in this case was not duly acknowledged within the meaning of the act of 1860. But it is insisted that the assignment is invalid because, by reason of the general bankruptcy laws of the United States, all state insolvent laws are suspended, and

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any assignment under such laws is absolutely void. This position is answered by *Thrasher agt. Bently* (59 *N. Y.*, 649), where it was held directly to the contrary.

In this case it does not appear that any proceedings in bankruptcy have been taken for the purpose of avoiding the assignment, and therefore we regard the case as one entirely unaffected by the general bankruptcy law of the United States.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

I concur: CHAS. DANIELS.

I dissent: JOHN R. BRADY.

Russell agt. Weinberg *et al.*

BROOKLYN CITY COURT.

RUSSELL agt. WEINBERG *et al.**Surety — when not liable for deficiency arising from foreclosure of mortgage.*

Where the defendant McC., after making the mortgage in suit, conveyed the mortgaged premises to defendant W., she assuming the payment of the mortgage, and upon the maturity of the bond and mortgage, McC. having come into the position of surety, requested the plaintiff (the mortgagee) to proceed immediately to foreclose and collect the debt; the plaintiff neglected for a year to commence his suit, and the proof showed that although the premises were of sufficient value to pay the mortgaged debt and costs of foreclosure at the time the request was made, they have since so far depreciated as to make it altogether probable that there will be a deficiency after applying the proceeds of the sale:

Held, that McC., occupying the position of surety, should not be made liable for any deficiency arising upon such foreclosure and sale

*Special Term, August, 1877.**Rufus L. Scott*, for plaintiff.*Roger H. Lyon*, for defendant McCrum.

REYNOLDS, *J.* — The defendant McCrum, after making the mortgage in suit, conveyed the mortgaged premises to defendant Weinberg, she assuming the payment of the mortgage. Upon the maturity of the bond and mortgage, McCrum having then come into the position of surety, requested the plaintiff (the mortgagee) to proceed immediately to foreclose and collect the debt, on the ground that the premises, which were then sufficient to satisfy the mortgage, might depreciate

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so as to become an inadequate security. The plaintiff neglected for a year to commence his suit, and the proof now shows that although the premises were of sufficient value to pay the mortgaged debt and costs of foreclosure at the time the request was made, they have since so far depreciated as to make it altogether probable that there will be a deficiency after applying the proceeds of the sale. The question is, whether the defendant McCrum should be made liable for such deficiency.

The rule seems to be, that if the creditor omits to do an act, on the requirement of the surety, which equity and his duty to the surety enjoins on him to do, and the surety is injured by the omission, the latter ought not to be held. That duty enjoins upon the creditor to enforce payment from the party primarily liable; and if being requested by the surety to collect the debt, when it is collectible from such party, by measures of active diligence, the creditor refuses or neglects to do it until it becomes uncollectible from the principal, such conduct ought to be a defense in equity to any suit brought against the surety to charge him with the payment of the debt. But failure on the part of the creditor to comply with the request of the surety to enforce payment of the debt will not exonerate the surety unless it result in actual injury to him, and then only to the extent of such injury. The solvency of the debtor or the sufficiency of the fund at the time when the request to collect was made, and subsequent insolvency or insufficiency, are essential parts of the defense of the surety, and must be alleged and proven by him (*Thomas on Mortgages*, 70, 71; *Remsen agt. Beekman*, 25 *N. Y.*, 552).

Plaintiff claims, however, that defendant McCrum has not brought himself within the rule releasing sureties, he not having shown that the defendant Weinberg is insolvent; and that as it does not appear but that plaintiff may be able to collect any deficiency out of her, defendant McCrum is not shown to have sustained any injury from the plaintiff's delay.

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The answer to this is, that if it turns out that the deficiency can be collected from Weinberg, it will be the duty of the plaintiff to so collect it, and in that case there is no occasion for a decree holding the defendant McCrum; but if it cannot be collected from Weinberg, and the defendant McCrum should be made liable, he would be thereby damnified, through the plaintiff's neglect, to the precise extent of the payment which he would thus be compelled to make. The mortgage having been collectible out of the property when the surety requested its collection, he ought not now to be called upon to make up for the subsequent depreciation of the property, and, therefore, there should not be any such direction against him in the judgment. Such direction, if effectual, would compel him to meet a deficiency which would not have existed if the creditor, the plaintiff, had complied with his reasonable request.

There must be judgment for a sale of the premises, and making the defendant Weinberger liable for any deficiency.

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N. Y. SUPERIOR COURT.

ANDERSON FOWLER agt. HENRIETTA BUTTERLY.

Assignment — by married woman of a policy of life insurance — Rights of assignee thereunder — Undue influence — evidence of.

Under and by virtue of the legislation of this state, in respect to insurance upon lives for the benefit of married women where the policy was what is known as an endowment policy, the amount insured being payable to the husband at a stated time, or to his wife if he died before such time, the wife acquires a contingent interest in such policy, and in the money to become due and payable thereon, of which, until the enabling act of 1873 (*Laws of 1873, chap. 821*), she could not divest herself by assignment or transfer.

Therefore, a paper to which the wife's signature appears to have been subscribed under date of October 13, 1873, and which purports to assign all her right, title, and interest in the policy to the plaintiff; *held*, to be inoperative as an assignment of her right to receive from the insurance company the sum which, by the terms of its contract, it became liable to pay to her upon the death of her husband during the period of the policy, provided she survived him.

Where the wife's signature to an assignment of her interest in a policy of insurance upon the life of her husband was procured from her by the exercise, on the part of her husband, of undue influence and control, amounting to compulsion; *held*, that such assignment gave no valid title thereto to the assignee.

Where the policy of insurance provided that the amount insured should be paid to the husband, provided his life continued beyond the term or period for which it was insured, and in case of his death before that time, it was payable to his wife:

Held, that the assignment, executed by the husband concurrently with that of the wife, operated only to transfer the contingent interest which he had in the insurance money and his right to collect it, provided his life continued beyond the term or period for which it was insured.

As between the assignee and the wife, no equity arose or can be invoked in favor of the assignee, except to the extent of premiums subsequently paid by him.

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THIS action is brought to recover the amount due upon a policy of life insurance, known as an endowment policy, issued by the North American Life Insurance Company to one Nicholas Butterly, the husband of the present defendant. It was originally commenced against the insurance company, on or about the 30th day of October, 1875, by the service of a summons and complaint on said insurance company. Said company, before answer, upon affidavit by S. S. Herrick, its general manager of the claim department of said company, that on or about the 27th day of September, 1875, Luke A. Lockwood, stating himself to be the attorney of Mrs. Henrietta Butterly, claimed that the proceeds of the life insurance policy, for the payment of which the said suit of the plaintiff against said company was brought, belonged to said Henrietta Butterly, and, at the same time, demanded that the amount of said policy should be paid by the company to the said Henrietta Butterly, and that the claim of said Henrietta Butterly was made without collusion between said insurance company and the claimant, whereupon, upon application of the plaintiff, said Henrietta Butterly was, by order of the court, dated December 1, 1875, substituted as defendant in the place of the North American Life Insurance Company, said company paying the amount then due on the policy into court.

The facts as to the policy are as follows : Nicholas Butterly, on or about September 6, 1867, applied to, and received from the North American Life Insurance Company a policy of insurance in his own name and right, as the party assured, on his own life, in the amount of \$5,000, until the 6th day of September, 1882, or until his decease, in case of his death before that time. All the premiums on said policy were paid, as they became due, by said Nicholas Butterly, up to and including the one becoming due September 6, 1869, in continuance of said policy, for twelve months ending September 6, 1870. On the request of said Nicholas Butterly, and upon the surrender of the above-mentioned policy by him

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to said company, the said company, on or about the 28th day of September, 1869, executed a new policy of insurance, same number, bearing same date, and of the like tenor and effect as to the times terms and conditions of the insurance, and which policy was duly executed and delivered on the 29th of September, 1869, to said Nicholas Butterly in lieu of, and in substitution for, the former policy of insurance, upon which the advance premium and all other payments of premiums had been paid and accepted as aforesaid, and as a continuance of that policy. It was witnessed and expressed in said last-mentioned policy (which is the one on which this suit is brought), that the North American Life Insurance Company, in consideration of the representations made, and of the sum of \$369.25 to them in hand paid by Nicholas Butterly, and of the annual premium of the like amount, to be paid on or before the sixth day of September of each and every year (or half or quarter yearly in advance, with interest), until the year 1881, inclusive, not exceeding fifteen annual premiums, did assure the life of Nicholas Butterly in the amount of \$5,000 until the 6th day of September, 1882, or until his decease, in case of his death before that time. And the said company did thereby promise and agree to and with the said assured, well and truly, to pay, or cause to be paid, the said sum insured to the said assured within ninety days after the termination of that assurance as aforesaid; or, in case he should die before that time, to Henrietta Butterly, wife, if living, otherwise to Alice V. Butterly, daughter of the said assured. The successive annual premiums to be paid on said policy on the 6th September, 1870; 6th September, 1871; 6th September, 1872, were duly paid by Nicholas Butterly, and the insurance therein assured was continued through the twelve months ending on the 6th day of September, 1873, at noon. On or about October 13, 1872, Nicholas Butterly executed and delivered a paper purporting to be an assignment of said policy to one Joseph E. McCormack, the consideration of which is disputed by the plaintiff;

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and she, also, by her answer, alleges that it is wholly void and of no effect, so far as her interest under said policy is concerned. At the same time an instrument of assignment of the same date, signed and executed by Henrietta Butterly (wife) and Alice V. Butterly (daughter of said Nicholas), consideration expressed in same being one dollar, purporting to sell, assign, transfer and set over unto said McCormack all their right, title, and interest in said policy. The answer alleges that, upon the request of her husband, she was induced, and did, without any consideration therefor, sign a paper of the contents of which she was entirely ignorant, and which she now believes to be the assignment referred to in said complaint; and she alleges that the said paper was executed by her, without consideration, at the request of her husband, without her knowledge of its contents, and under the fear that, if she declined to execute the paper, she would incur the displeasure of her said husband, and she avers that the said paper was and is illegal, void and of no effect whatever.

At the time of the execution of the said assignments, said Nicholas Butterly delivered to said Joseph E. McCormack the said policy of insurance, and due notice of said assignments to said McCormack was given to said company, and the same were entered on the books of, and recorded by, said company March 11, 1873. Said Joseph E. McCormack, on the 6th day of October, 1873, paid to said company, and said company accepted from him, \$369.25 for premium due September 6, 1873. On or about the 24th day of December, 1873, Joseph E. McCormack, in consideration of one dollar, sold, assigned and set over to this plaintiff the said policy of insurance, of which said assignment to this plaintiff the said company had due notice, and the same was entered on its books and recorded by the company on the 24th day of December, 1873. McCormack, on the 4th day of September, 1874, paid to said company, from funds furnished by this plaintiff and on his account, \$369.25, for premium due September 6, 1874, continuing said policy to September 6, 1875.

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Nicholas Butterly died on the 9th day of April, 1875. Due notice of such death was given by this plaintiff to said company on or about the 6th day of May, 1875, and, on the 23d day of June, 1875, this plaintiff presented and furnished to said company satisfactory evidence of such death, and proof of the just claim of the assured thereunder. The defendant also caused due proof of loss, and of her claim to the amount of said policy, to be served upon said company.

C. Van Santvoord, for plaintiff.

Luke A. Lookwood, for defendant.

SANDFORD, J.— Under and by virtue of the legislation of this state, in respect to insurance upon lives for the benefit of married women, the defendant acquired a contingent interest in the policy upon which this action was originally brought, and in the money to become due and payable thereon, of which, until the enabling act of 1873 (*Session Laws, ch. 821*) she could not divest herself by assignment or transfer (*Eadie agt. Slimmon*, 26 N. Y., 9; *Barry agt. Equitable Ins. Co.*, 59 *id.*, 587). The paper, therefore, to which her signature appears to have been subscribed, under date 13th of October, 1872, and which purports to assign all her right, title and interest in the policy to one Joseph E. McCormack, was inoperative as an assignment of her right to receive from the North American Insurance Company the sum of \$5,000, which, by the terms of its contract, it became liable to pay her upon the death of her husband during the period of the policy, provided she survived him. Her interests under this contract formed no part of her separate estate, and no power of disposing of them accrued to her by virtue of the "married women's acts," so called. The plaintiff, therefore, acquired no title to, or right to receive the funds in controversy, by virtue of that paper.

If, however, an assignment, duly executed by the defend-

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ant, could in law be deemed to pass the title which she had, the evidence establishes, beyond controversy, the fact that her signature was not affixed to the instrument purporting to be an assignment of her interest, voluntarily and without compulsion on the part of her husband. On the contrary, it appears, and I must find as matter of fact, that she subscribed such pretended assignment without any knowledge of its purpose or purport, without any consideration passing to her for so doing, and without any intention, on her part, to divest herself of her property or rights; and that her signature thereto was procured from her by the exercise, on the part of her husband, of undue influence and control, amounting to compulsion. She testifies that if she signed the paper at all, of which she has no recollection, though she admits the fact, she signed it at the request and in the presence of her husband, and because she was "afraid to refuse." He was very self-willed, very determined, and not in the habit of consulting her in regard to his affairs. He did not consult her in regard to taking out the policy, and though neither promises nor actual threats were employed to induce her to part with her interest in it, the evidence warrants the conclusion that she did so while under marital influence and constraint, and not as her own free act.

The assignment, executed by the husband concurrently with that of the wife, operated, in my judgment, only to transfer the contingent interest which he had in the insurance money and his right to collect it, provided his life continued beyond the term or period for which it was insured, viz., "until the 6th day of September, in the year 1882." The money was payable to him only on that condition. In case of his death before that time, it was payable to his wife if living. The plaintiff and McCormack, his assignor, received the instrument and the documents purporting to transfer it, with full notice, from its terms, of the respective rights and interest of both husband and wife; and McCormack testifies that, although he knew the defendant, he had no negotiations with

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her in relation to this purchase; that he paid her no money and agreed to pay her none, and that the entire transaction was between himself and her husband. I am of opinion that, as between him and her, no equity arose or can be invoked in his favor, except to the extent of premiums subsequently paid.

Judgment may be rendered directing payment to the plaintiff from the fund now in court of a sum equivalent to the aggregate amount of such premiums, with interest on each from the date of its payment, and declaring the defendant entitled to receive, and directing payment to her of the residue of such fund. Costs are allowed to neither party.

Stern *et al.* agt. Florence Sewing Machine Company.

STERN *et al.* agt. THE FLORENCE SEWING MACHINE COMPANY.

Lease—Assignee of, when not liable for rent—how his liability may be terminated—Agreement to pay rent without consideration to support it—Counter-claim for violation of agreement to heat premises.

An assignee of a lease is not liable for rent of the demised premises, except for the time he occupies them, and may at any time terminate his liability for rent by assigning the lease.

Plaintiff rented to J. J. M. & Co. certain premises, and they went into possession of same in February 1869, and occupied up to January 1, 1870, at which time defendant went into possession. The lease was dated October 15, 1870, and was for a term ending May 1, 1872, at the annual rent of \$900, from said fifteenth October until May 1, 1871, and at the rate of \$1,050 from last-mentioned date until the end of the term. The plaintiff, by said lease, agreed to heat and warm said premises in a comfortable manner. J. J. M. & Co., being indebted to defendants, and being insolvent and unable to pay, defendants purchased their stock of sewing machines and took an assignment of their property, among which was the lease in question. The defendants, through their agent, asked plaintiff if he would be willing to assign the lease to them, and he replied that he would, provided he got his pay promptly and they assumed all the responsibility of J. J. M. & Co., and paid him his rent promptly, which defendants, through their agent, agreed to do, and thereupon plaintiff executed the consent on the lease:

Held, that the agreement of the defendants to pay rent (if such an agreement was, in fact, made) was without consideration to support it, and that what passed between plaintiff and the agent of defendants could not be construed into a new and distinct agreement to rent the premises and to pay rent otherwise than as specified in the written lease.

Held, also, that plaintiff having agreed to heat the premises rented to the defendants, and having violated that agreement, the defendant was entitled to recover, by way of counter-claim, such damages as it showed itself entitled to.

Fourth Department, General Term, December, 1876.

APPEAL from judgment on the report of a referee.

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The plaintiffs, in their amended complaint, allege that, on the 1st of February, 1871, they rented to the defendants a portion of store No. 34 in Globe Hotel block, in the city of Syracuse, from that date until the 1st of May, 1872, at the rate of \$1,000 per year, payable monthly, in advance. Defendants went into possession, but have refused to pay said rent; and there was due and unpaid the rent accruing on said lease for the months of November, December, 1871, and January and February, 1872, amounting to the sum of \$333.33, with interest on the monthly installments from the time they became payable.

The answer, as amended, sets up five defenses to the complaint, to wit.: First. A general denial. Second. Payment. Third. That the lease under which the defendants held the premises had been assigned before suit, and before rent in question had accrued. Fourth. Premises untenable and possession surrendered. Fifth. A counter-claim.

The cause was referred to a referee. On the trial, the plaintiff Stern was examined as a witness and testified that plaintiffs rented to J. J. Morse & Co. a part of the store occupied by plaintiffs, hereinbefore described. They (J. J. M. & Co.) went into possession in February, 1869, and occupied up to January 1, 1870, at which time defendants went into possession. The lease from plaintiffs to J. J. Morse & Co. was then put in evidence by the plaintiff. It is dated the 15th of October, 1870, and is for a term commencing on the 15th of October, 1870, and ending May 1, 1872, at the annual rent of \$900, from said fifteenth of October until May 1, 1871, and at the rate of \$1,050 from last-mentioned date until the end of the term. By said lease, defendant had the privilege of using a part of the cellar under said store for the purpose of storing sewing machines, and for other purposes connected with the business.

The plaintiffs, in and by said lease, undertook and agreed to heat and warm said store, including the half thereof leased to defendant, in a comfortable manner, suitable to its business.

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J. J. Morse & Co. were indebted to defendant for the price of sewing machines sold to them, and, being insolvent and unable to pay therefor, the defendant sent one Folts, as its agent, to Syracuse to obtain security for such indebtedness, and to that end, to purchase the machines that J. J. Morse & Co. had on hand, and take an assignment of their notes, etc., to be collected, and the proceeds applied on the debt due to defendant.

Folts went to Syracuse and purchased the machines of J. J. Morse & Co., and took an assignment of the rest of their property as security for their debt due to defendant.

Amongst other assets of J. J. Morse & Co. was the lease, from plaintiff to them, of the store in question, and they assigned it to defendant on the 1st of February, 1871. Folts applied to plaintiff Stern for his consent to such assignment, and he replied that he would consent, provided he got his pay promptly and they assumed the responsibilities of J. J. Morse & Co., which Folts agreed to do, and thereupon Stern signed a consent to the assignment of the lease. This evidence, as to the parol agreement between plaintiffs and Folts, the defendant's counsel moved to strike out as incompetent, and as merged in the writing. The motion was denied, and the defendant's counsel excepted.

The defendant remained in possession from the time of the foregoing arrangement until the 3d of October, 1871, paying rent. At the date last mentioned, the defendant caused to be served on plaintiffs a notice, in writing, that they quit and surrendered possession of said premises because said premises were untenable and unfit for occupancy, and not heated and warmed in a comfortable and suitable manner.

On the part of the defense, evidence was given tending to prove that the roof of that part of the building occupied by defendant leaked when it rained, and injured some of the sewing machines, rendering it necessary on several occasions to remove some of them to other parts of the store, and to cause them to be repaired and put in order so that they would

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operate. Evidence was also given tending to prove that the store was not properly heated, and that water came into the cellar where the machines were stored. The plaintiffs did not claim that the roof did not leak, nor but that defendant's employes had to move, from time to time, machines, nor but they were to some extent injured by the water, nor that the store was not properly heated, but plaintiffs' evidence tended to prove that the roof did not leak as extensively as defendant's witnesses testified to; and that the water in the cellar was caused by a break in the water pipe in an adjoining store, and that there was, at all times, a sufficient supply of coal in the cellar with which defendant's men might have made and maintained a fire sufficient to heat said store.

Plaintiffs also gave evidence tending to prove that whenever they were notified that the roof leaked, they called on their landlord to repair it, and he did so on several occasions; at one time he put a new roof over the part occupied by defendant. On the 3d October, 1871, the defendants assigned the lease from plaintiffs to J. J. Morse & Co., and by them assigned to defendant, to one Andrew Ames, by the advice of counsel, in order to release themselves from further liability to pay rent, disclaiming, in said assignment, any and all interest in said demised premises.

The part of the store occupied by defendant remained unoccupied from the 3d October, 1871, when it left said store, until the 1st of March, 1872, when it was leased to another tenant. The referee finds most of the facts above set forth, and, also, that the leaking of the roof, although it incommoded the defendant, was not sufficient legal excuse for abandoning the premises; and that the neglect to keep the store comfortably warm did not justify defendant in abandoning the premises, or relieve him from liability to pay the rent. His conclusions of law were, that the parol agreement, made at the time plaintiffs consented to the assignment of the lease, established a parol letting for the residue of the term specified in the written lease, and at the rent therein reserved;

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and that, although void by the statute of frauds, yet defendant having entered and occupied, rendered such letting valid for one year, and operated as a surrender, by operation of law, of the original lease, and defendant is liable for the rent for the whole term the plaintiffs were unable to relet.

The referee ordered judgment in favor of the plaintiffs for the sum of \$299.25. The defendant's counsel excepted to the conclusions of law. Judgment was entered in conformity with the report of the damages and costs of the action. From that action the defendant appeals.

William C. Ruger, for respondent.

Irving G. Vann, for appellant.

MULLIN, *P. J.* — The assignee of a lease is not liable for rent of the demised premises except for the time he occupies them, and may at any time terminate his liability for rent by assigning the lease (2 *Platt on Leases*, 416; *Taylor on Landlord and Tenant*, sec. 444; *Woodfall L. and T.* [edition of 1871], 208, 369, 681).

The defendant assigned the lease in question to one Ames on the 3d October, 1871, and abandoned possession. Under the authorities referred to, the defendant was no longer liable for the rent; but the referee decides, as matter of law, that the defendant expressly agreed to assume the liabilities of Morse & Co. under the lease, and the payment of the rent was one of those obligations.

This conclusion of the referee is based upon the evidence of the plaintiff, given on his own behalf on the trial, which evidence is as follows, viz. :

"Folts" (a duly authorized agent of the defendant) "asked me if I would be willing to assign the lease to defendant. I replied that I would, provided I got my pay promptly, and they assumed all the responsibilities of J. J. Morse & Co., and paid me my rent promptly, which Folts agreed to do,

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and thereupon I executed the consent on the lease. Folts said the company was more responsible than J. J. Morse & Co., and would pay rent more punctually and become responsible for it."

It cannot be claimed, upon this evidence, that Folts was intending in this interview with the plaintiff to abandon the written lease, and to enter into a verbal one for any period of time. Folts desired plaintiffs' consent to the assignment of the written lease, and his consent was given. The old lease was not varied in the slightest particular. The plaintiffs' consent was given, upon the condition that defendant would pay the rent promptly and assume the obligations of J. J. Morse & Co., and Folts, representing the defendant, accepted the condition.

By taking an assignment of the lease, the defendant assumed the obligations imposed by the lease on J. J. Morse & Co., and one of these was the payment of the rent. No parol agreement was necessary to charge the defendant with these obligations, and the agreement to pay promptly did not hasten or retard the time of payment specified in the lease. The consent of plaintiff was not necessary to enable J. J. Morse & Co. to assign the lease to the defendant, there being no prohibition in the lease against assignment.

The agreement of the defendant to pay rent, if such an agreement was in fact made, was without consideration to support it. But it seems to me legally impossible to construe what passed between plaintiff and Folts into a new and distinct agreement to rent the premises, and to pay rent otherwise than is specified in the written lease.

The plaintiff having agreed to heat the premises rented to the defendant, and having violated that agreement, the defendant was entitled to recover by way of counter-claim such damages as it showed itself entitled to. But the defendant failed to furnish to the referee any data to enable him to ascertain the amount of damages to which it claimed to be entitled.

These remarks apply to the other claims, on the part of the

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defendant; but, in the view we take of this case, it is unnecessary to allude to them.

The building was not in such a dilapidated condition, or so out of repair, as to justify the defendant in abandoning the premises.

The judgment is reversed and a new trial granted before another referee, costs to abide event.

TALCOTT and SMITH, JJ., concurred.

Bowghen agt. Nolan.

N. Y. MARINE COURT.

MARGARET BOWGHEN agt. JAMES E. NOLAN.

Answer — sufficiency of verification under new Code of Civil Procedure.

An answer containing two paragraphs, the first of which denies *positively* all the allegations contained in the first count of the complaint; and the second alleging that the defendant has no knowledge or information sufficient to form a belief as to the truth of the facts contained in the second count of the complaint, is a sufficient verification under section 526 of the Code of Civil Procedure.

The verification need not be in the exact words of the statute, but a substantial compliance is sufficient.

Special Term, September, 1877.

McADAM, J. — The defendant interposed an answer to the complaint in due time, and the plaintiff returned it upon the ground that, under section 528 of the Code of Civil Procedure, it was a nullity, because the form of verification used thereon was that prescribed by the former Code (*sec. 157*), and not that required by section 526 of the new Code. The answer contains two paragraphs. The first denies positively all the allegations contained in the first count of the complaint. This is unquestionably a good denial. The second alleges that the defendant has no knowledge or information sufficient to form a belief as to the truth of the facts contained in the second count of the complaint. The new Code permits this form of denial (*sec. 500*), and provides (*sec. 524*) that it must be regarded as an allegation that the person verifying the pleading has not such knowledge or information. It is not an allegation upon information and belief, but a denial that

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the affiant has either knowledge or information upon which he is enabled to form a belief. Both of the forms of denial used herein are, therefore, positively made.

Under such circumstances, it was needless to insert in the verification the words "except as to the matters therein stated *to be alleged* on information and belief," because none of the matters are so alleged. Section 526 of the new Code is almost similar to section 157 of the old Code, the only real difference being indicated above in italics.

Section 526 (*supra*) does not prescribe any particular words with which the verification must be made, but provides that "it must be *to the effect*" therein stated, and in this respect it follows 157 of the old Code.

Under the section last referred to, the courts uniformly held that the verification need not be in the exact words of the statute, and that a substantial compliance was sufficient. For examples, see *Waggoner* agt. *Brown* (1 *How. Pr.*, 212), *Radway* agt. *Mather* (5 *Sandf.*, 655), *Harris* agt. *Trip* (4 *Abb.*, 232), *Whelpley* agt. *Van Epps* (9 *Paige*, 333), *Kinkaid* agt. *Kip* (1 *Duer*, 692). In the case last cited (*Kinkaid* agt. *Kip*), the superior court held that where a defendant, in his answer, has stated nothing on information and belief, his affidavit that his answer is true to his knowledge, without adding the words "except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true," is a sufficient and proper verification. Under the construction which I have put upon the provisions of the Code of Civil Procedure, before referred to, it follows that the defendant's verification was sufficient, and that the plaintiff was not justified in disregarding the answer served with it.

The judgment entered by the plaintiff was, therefore, irregular, and must be set aside.

Ordered accordingly.

Heartt agt. Livingston.

SUPREME COURT.

JONAS S. HEARTT and others agt. LOUISE P. W. LIVINGSTON
and others.

Will—construction of—Codicil disinheriting a child and revoking a devise as to him—its effect on the will—who takes his share—residuary clause—effect of codicil on same.

The eighth clause of the testator's will is as follows: "After the payment of my just debts and funeral charges I give and bequeath the rest and residue of my property, real and personal, of every kind and description, to my four children, Mary Wright Heartt, Charles S. Heartt, Jonas S. Heartt and Jane Lamberson, the wife of Edward Schell, to be equally divided between them, share and share alike."

The ninth clause declares: "In the event of any of my children dying, or either of them, before a division of my estate, leaving issue, then the share or shares to which he, she or they respectively would be entitled to under and by virtue of this will shall go to his, her or their issue respectively."

By a codicil to the will the testator says: "Whereas I, Jonas C. Heartt of the city of Troy, county of Rensselaer and state of New York, have made my last will and testament, in writing executed the 10th day of February, in the year 1870, in which I have made certain devises and bequests to Charles S. Heartt; now, therefore, I do, by this writing, which I hereby declare to be a codicil to my said last will and testament, and to be taken as a part thereof, revoke and cancel the devises and bequests, and each and every of them embraced in my said will to the said Charles S. Heartt."

The will bears date February 10, 1870, and the codicil thereto January 14, 1874. Charles S. died before the father, and on or about the 4th day of March, 1874, leaving one child the defendant Louise P. W. Livingston. The testator had at the time of making the will and codicil four children, to wit, Jonas S. (the plaintiff) and Mary W. and Jane L. (two of the defendants) and Charles S., aforesaid; and at the time of his death the said three children and Mrs. Livingston, the daughter of his deceased son Charles, were his only descendants:

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Held, that, reading the codicil as a part of the will and as an amendment thereof, which both the law and the language thereof declare must be done, all devises and bequests to Charles are to be eliminated therefrom, the plain effect of which is to devise the residue of the estate to the remaining children, Jonas S., Mary W. and Jane L.

When a testator has four children to provide for and gives to them the entire estate, share and share alike, and then by a codicil disinherits the one and revokes the devise as to him, the remaining three take the whole; and when a testator having but four children, by the residuary clause of the will gives such residue to the four equally, and then by codicil revokes the devise to the one, the other three take the whole. As amended by the codicil the will gives all to the three instead of the four.

Although, as the will reads without the codicil, the proportion of each of the four named in the residuary clause would be one-quarter, yet this result is not expressed in words, and the question is not what was the original intention of the testator, but what did he intend when he made the codicil? That intention is to be gathered from the words of the will as it will read after an amendment which strikes out one name. So reading this will, as amended by the codicil, the devise is of all the residue to the three, as no words remain which limit the share of each one of the three to one-quarter of the whole.

The ninth clause of the will makes no independent devise to Mrs. Livingston or any of the grandchildren. If the child would, if living, have taken nothing under the will, then the issue can take nothing. By the will, as amended by the codicil, Charles S. would have taken nothing; and as he could not, Mrs. Livingston cannot.

In addition to the provision made for Mary W. by the residuary clause in the will, that instrument, in its first clause, declares: "I give and bequeath to my daughter Mary W. the use and occupation of the lot and dwelling-house in which I now reside, No. 67 First street, together with all the vacant ground connected thereto, being sixty-six feet eight inches of front on First street and 130 feet deep, together with all the out-buildings on the same; also all my household furniture, beds, bedding, silver plate, books, fixtures, as well as every other kind of personal property which may be on the premises of my residence at the time of my decease and belonging to me, except such articles as I may hereinafter dispose of."

The next clause sets apart securities enough to produce an income annually of \$5,000 to be paid to the said Mary W. in monthly, quarterly or half-yearly payments, as she may elect, to keep up the establishment and pay taxes and insurance so long as she may occupy the premises given to her by the first clause. For how long a period of time she should have the use of the homestead the will did not provide, and the first

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clause in the will is the *only devise* to her of any *specific* real estate whatever.

The codicil then provides: "I also hereby declare that *the* devise of real estate in my said will to my daughter Mary W. is a devise of the same to her for her natural life; and *such* devise to her for all real estate contained in my said will is to be construed and to have effect as a devise of the same to her for her natural life."

Held, that the devise of the homestead contained in the first clause of the will to Mary W. is limited, by the codicil, to her life.

Held, also, that as to Mary W. the residuary clause of the will is undisturbed by the codicil.

Rensselaer Circuit, 1876.

ACTION to construe the will of Jonas C. Heartt.

Charles E. Patterson, attorney for plaintiffs.

E. Cowen, of counsel for Mrs. Schell.

John B. Gale, for Mrs. Livingston.

WESTBROOK, J. — The will of the testator bears date the 10th day of February, 1870, and the codicil thereto January 14, 1874. Charles S. Heartt, a son of the testator, and concerning a devise to whom in the original will the principal question in this cause arises, died before the father, and on or about the 4th day of March, 1874, leaving one child, the defendant Louise P. W. Livingston. The testator had, at the time of making the will and codicil, four children, to wit, Jonas S. Heartt (the plaintiff) and Mary Wright Heartt and Jane Lamberson Schell (two of the defendants), and Charles S. Heartt, aforesaid; and at the time of his death, the said three children and Mrs. Livingston, the daughter of his deceased son Charles, were his only descendants.

The eighth clause of the will is as follows: "After the payment of my just debts and funeral charges, I give and

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bequeath the rest and residue of my property, real and personal, of every kind and description, to my four children, Mary Wright Heartt, Charles S. Heartt, Jonas S. Heartt and Jane Lamberson, the wife of Edward Schell, to be equally divided between them, share and share alike."

The ninth declares: "In the event of any of my children dying, or either of them, before a division of my estate, leaving issue, then the share or shares to which he, she, or they respectively would be entitled to under and by virtue of this will, shall go to his, her, or their issue respectively."

By the codicil to the will, the testator says, "Whereas, I, Jonas C. Heartt of the city of Troy, county of Rensselaer, and state of New York, have made my last will and testament in writing, executed the 10th day of February, in the year 1870, in which I have made certain devises and bequests to Charles S. Heartt; now, therefore, I do, by this writing, which I hereby declare to be a codicil to my said last will and testament and to be taken as a part thereof, revoke and cancel the devises and bequests, and each and every of them embraced in my said will to the said Charles S. Heartt."

The first question which arises upon the construction of the clauses of the will and codicil just given is, what becomes of the share, which in the original will was bequeathed to Charles? Does it go to the daughter of Charles, under the ninth clause? Or is it to be regarded as undevised, and go to the heirs at law, generally? Or is it disposed of by the residuary clause (the eighth) to the three other children?

Without attempting any lengthy discussion of the questions, the intention of the testator seems quite clear. Reading the codicil as a part of the will, and as an amendment thereof, which both the law and the language thereof declare must be done, all devises and bequests to Charles are to be eliminated therefrom, the plain effect of which is to devise the residue of the estate to the remaining children, to wit, Jonas S. Heartt, Mary Wright Heartt and Mrs. Schell. When a testator has four children to provide for, and gives to them

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the entire estate, share and share alike, and then by a codicil disinherits the one, and revokes the devise as to him, it is clear the remaining three take the whole. And when a testator having but four children, by the residuary clause of the will gives such residue to the four equally, and then by codicil revokes the devise to the one, it seems equally clear that the other three take the whole. As amended by the codicil, the will gives all to three, instead of the four.

It is strenuously urged, however, that the devise to Charles S. Heartt being only revoked by the codicil, such revocation would not enlarge that made to others, who each took only a fourth by the original will and this would leave what was originally intended for Charles undevise. This argument is based upon a wrong assumption. It is true that the testator intended originally to devise the residue among the four equally, but that does not prove that his intention as to the three remained the same when the will was changed by codicil. His intent must be then ascertained by reading the will as altered. Though he meant at first that Jonas, Mary and Mrs. Schell should have only a one-fourth part each of the residuary estate, yet when the codicil was made, he may have intended that their share should be one-third each. It is true the codicil in words does not enlarge the devise to the three, but it may, by striking out words and phrases from the will, make the latter instrument so read as to enlarge the original devise to them. Has it done this? This is the question we are to consider. The devise in the will is not of one-quarter of the residue of the estate, in words, to each one of the four children by name, in which case, if the devise of the one-quarter to one of the four had been revoked, it might have been plausibly argued, that as the remaining three were each by express words of limitation, to take a quarter only, the remaining quarter, the devise of which was recalled by the codicil was undisposed of by will, and would go to the heirs at law generally; but the devise, instead of being a single quarter to each, in words, is of the whole residue in bulk to

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the four, and the revocation as to one of the four simply strikes his name from the clause creating it, leaving it as a devise of the whole to the three. This follows from the fact that in the one case the proportion of each is defined by express words, and in the other it is not. As the effect of the codicil is simply to strike out the name of one from the devise, that to the others could not be enlarged, for the language of the instrument as to the remaining three would still be unchanged — one-quarter to each. When, however, the proportion of each is not declared in words, but is of the whole to the four generally, when the name of one is eliminated, that which originally was to go to four equally, share and share alike, goes to three, for there is no language in the instrument expressly limiting the proportion of each. If A, B, C and D are named in a deed as grantees, and the proportion of each is undefined in words, when D's name is stricken out, it would then read as a conveyance to the three, and if executed and delivered in that form, it would pass the title to the three. If, on the other hand, the four, A, B, C and D had been named as grantees, and the deed had further in express words declared that each should have only one-quarter, the erasure of the name of D from the conveyance, without erasing the clause giving to each a quarter, would still leave the instrument expressly declaring that A, B and C should each have a quarter only. Precisely this is the case before us. The codicil strikes the name of Charles from the devise, and leaves it perfect as to the three, without any language still remaining therein showing that the others take less than the whole residue. It is true that as the will reads without the codicil, the mathematical proportion of each of the four named in the residuary clause would be one-quarter, but this mathematical result is not expressed in words, and the question is not what was the original intention of the testator, but what did he intend when he made the codicil? That intention is to be gathered from the words of the will, as it will read after an amendment which strikes out one name.

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So reading this will, as amended by the codicil, we have no trouble, for the devise is then of all to the three, for no words remain which limit the share of each one of the three to one-quarter of the whole.

This construction substantially disposes of all the questions arising upon this part of the will. As, however, it has been claimed that Mrs. Livingston would inherit her father's share under the ninth clause, it may be well to say a word upon that. That clause makes no independent devise to Mrs. Livingston, or any of the grandchildren. In case of the death of any of the children, leaving issue, before a division of the estate, then such issue shall take the share that the child would have taken under such will if he or she had lived. If the child would, if living, have taken nothing under the will, then the issue can take nothing. By the will, as amended by the codicil, Charles S. Heartt would have taken nothing, and as he could not, it is clear that Mrs. Livingston could not.

The next and remaining difficulty in the will is, as to the share of Mary Wright Heartt, one of the daughters. In addition to the provision made for her by the residuary clause in the will, that instrument, in its first item, declares, "I give and bequeath to my daughter, Mary Wright, the use and occupation of the lot and dwelling-house in which I now reside, No. 67 First street, together with all the vacant ground connected thereto, being sixty-six feet eight inches of front on First street, and 130 feet deep, together with all the out-buildings on the same; also, all my household furniture, beds, bedding, silver plate, books, pictures, as well as every other kind of personal property which may be on the premises of my residence at the time of my decease and belonging to me, except such articles as I may hereinafter otherwise dispose of.

The next clause sets apart securities enough to produce an income annually of \$5,000 to be paid to the said Mary Wright in monthly, quarterly or half-yearly payments, as she may elect, to keep up the establishment and pay taxes and insur-

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ance so long as she may occupy the premises given to her by the first clause.

For how long a period of time she should have the use of the homestead the will did not provide, and the first clause in the will is the only devise to her of any specific real estate whatever.

The codicil then proceeds: "I also hereby declare that *the* devise of real estate in my said will to my daughter, Mary, is a devise of the same to her for her natural life; and *such* devise to her of all real estate contained in my said will is to be construed and to have effect as a devise of the same to her for her natural life."

It will be observed that the testator speaks of a single devise of real estate and made emphatic, not only by using the singular number "*devise*," but by calling it "*the* devise" and "*such* devise;" and this is made the more significant by the previous clause in the codicil in regard to Charles, which revokes and cancels "the devises and bequests" (using the plural); and then to make it still more pointed adds, "and each and every of them." The testator surely knew that there were two devises in the will under which Mary Wright could take real estate. He knew the difference between the use of a noun in the plural or singular number. He had made in the will only a single devise to Mary Wright of real estate specifically, and the term of the use of that had not been prescribed. When, under such circumstances, he speaks of "*the* devise of real estate" and of "*such* devise," what could he mean other than *that* devise of real estate, for the length of-occupancy of which the will did not provide and for which the codicil did?

This view is also strengthened by the very apparent objects of the first two items in the will. The house establishment was to be kept up for the common benefit of the family. When Mary, however, to whom this duty was confided, died, it was but just that such homestead, maintained for all, should not go to her heirs alone. It was, therefore, limited to her

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life. There is this reason for such a provision in the codicil, when applied to this devise, but it fails entirely when applied to the residuary clause.

My construction of this portion of the will and codicil is, that as to Mary Wright Heartt the residuary clause in the will is undisturbed by the codicil.

Findings will be prepared by the attorney in accordance with this opinion, which will be settled on notice.

Mausbach agt. Metropolitan Life Insurance Company.

SUPREME COURT.

REGINA MAUSBACH agt. THE METROPOLITAN LIFE INSURANCE COMPANY.

Life insurance—Equity power of the court where a policy has been canceled—Tender of premiums—Misrepresentations in application for policy—Evidence of.

As the contract of life insurance is a peculiar one, and as it is fit and proper that the parties should know their rights under such a contract, where the present rights under such a contract are denied, a proper case is made out for the exercise of the equitable powers of the court.

In ordinary cases courts will not, in advance of any present duty, obligation or default, declare the rights and obligations of suitors. They will do it where peculiar circumstances render it necessary to the preservation of right.

Where the allegations of the complaint are that the plaintiff has tendered the premiums due and that the defendant refused to receive them and canceled the policy:

Held, that the plaintiff has a standing in court and is entitled to the relief asked for.

The evidence as to the alleged false representations made by the assured at the time of the application for the policy, *considered, criticised and held* to be entirely insufficient to justify the court in holding that at the time of the application for the insurance the assured was suffering with the disease as claimed by the defendant.

Special Term, May, 1877.

THIS action was brought to compel the defendant, The Metropolitan Life Insurance Company, of the city of New York, to restore the policy in question to its original force and effect, said company having canceled it on its books.

The complaint alleged, in substance, that defendant was a corporation organized under the laws of the state of New York; that on the 26th of July, 1873, in consideration of

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eighteen dollars and fifty-seven cents (being the one-quarter annual premium on said contract) paid them by plaintiff, and of a like amount to be paid thereafter on or before the twenty-sixth day of July, October, January and April in every year, it executed and issued to her a policy of insurance on the life of her husband Simon Mausbach, in the amount of \$3,000, for the term of twenty years ending with the 26th day of July, 1893; that the policy contained the conditions, that should said Simon Mausbach die before the expiration of said twenty years, the said \$3,000 should be paid to plaintiff in full; and in the event of his dying after said twenty years the said defendant agreed to pay to this plaintiff the reserve endowment on said contract amounting to \$711.06, that by a stipulation in said contract the defendant agreed to place to the credit of this plaintiff at the end of each year her equitable share of the reserve dividend until the completion of ten years, and if Simon Mausbach then lived to pay the same in gross to this plaintiff; that plaintiff has paid the sum of money required by her to be paid as a premium for upwards of three years, and has, in every other respect, fulfilled any and all conditions by her to be done under said contract; that during the months of October or November, and before the commencement of this action, this plaintiff caused a tender of the amount due said defendant on said contract, and at the time the same was due, to be made to it, but said defendant has refused and still refuses to receive the same; that the said plaintiff is informed, and believes, that said defendant has canceled the contract on its books in subversion of her rights and to her damage; that said defendant has not placed to her credit any share to which she may be entitled, and has refused and now refuses to do so; that Simon Mausbach is still living, and that the wrongful acts of the defendant, in refusing to receive the premiums and in threatening to cancel and annul the same on said contract, and in refusing to place to the credit of the plaintiff her proper share of the dividend, are subversive of law and right and against the express stipulations

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of said contract agreed to by defendant. She asked, as relief, that defendant be ordered and compelled to restore the said contract to its original force and effect; that defendant be ordered to continue the same in force according to the terms thereof; that defendant be compelled to make a discovery of its books under oath, to enable the plaintiff to ascertain the proper amount of credits due her, and for such further relief, &c.

The policy has been canceled on the books of defendant on the ground of alleged misrepresentations of the assured in his application for the same.

On the trial of the cause the defendant procured two examining physicians, who testified that the assured had, during the course of a subsequent medical examination of him, acknowledged that he had been sick prior to his application for insurance. These physicians testified as their opinion that he *had* so been sick, relying for that opinion partly upon his *aforesaid alleged* statement and partly upon that examination which was shown to have been both short and superficial. The plaintiff produced two physicians in rebuttal; one, the consulting doctor for the company, who had examined him at the time of his application, who pronounced him healthy, and the other his family physician. She also produced Dr. H. D. Ramsey as an expert, who testified that, under the circumstances in evidence, no intelligent impression could have been arrived at by the doctors who testified for the defendant. The plaintiff also denied having made the alleged statement, and testified that two distinct tenders of the aggregate amount due the company were made, but the money was refused by note from defendant relieving the plaintiff from any obligation, at the same time suspending her privileges until a trial could be had.

The defendant moved to dismiss on the ground: First. That the plaintiff is bound to show that her tender of the premiums has been kept good. Second. That the complainant has no standing in equity.

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Charles Straus, for plaintiff.

Arnoux, Ritch & Woodford, for defendant.

VAN BRUNT, J. — The case of *Cohen* agt. *The New York Mutual Life Insurance Company* (50 N. Y., 610) is an authority directly sustaining the right of the court to entertain an action like the one at bar.

In that case it was held that, as the contract of life insurance is a peculiar one, and as it is fit and proper that the parties should know their rights under such a contract, where the present rights under such a contract are denied, a proper case is made out for the exercise of the equitable powers of the court.

That case seems also to dispose of the claim made by the defendants that the plaintiff has no standing in court, because the tender of the premiums has not been kept good. In that case there was no allegation that the tender had been kept good, yet the plaintiff was granted relief. The only remaining question is a question of fact, viz.: Were false representations made to the defendants in respect to the health of Simon Mausbach, at the time of the application upon the policy in question?

The evidence upon the part of the defense to sustain their claim in this regard, consists of the testimony of two physicians, who claim to have examined the assured in the year, 1873, and to have found, from such examination and from the statements made by the assured to them, that he had been suffering, anterior to the issuance of the policy upon his life, with chronic bronchitis and asthma, and had consulted physicians in Europe in respect thereto. If the testimony of these physicians is to be taken as true, then there clearly were misrepresentations made to the defendants as to the health of the assured, and they would have the right to cancel the policy which they had issued.

It seems to me apparent that the judgment of these phy-

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sicians depended upon the statements alleged to have been made to them by the assured, rather than from any examination which they themselves made. At the time of this examination, it was entirely immaterial to them whether the disease was of long standing or of recent contraction, and their examination of the patient was so cursory and superficial that it doesn't seem possible that any solid judgment could have been based thereon. Neither was any satisfactory evidence given to show that it is possible, upon an examination of a patient, to tell whether the disease is of two or four years standing. If it is possible to determine, with any degree of certainty, the length of time during which the disease has been progressing by the changes in the symptoms or otherwise, then it is equally certain that upon an examination being made during the time the disease is thus progressing, that its presence would be detected.

Yet we find, from the evidence in this case, that a physician examined the assured at the time of the application for this assurance and found no evidences of any disease. We find, also, that the friends and acquaintances of the assured never saw any indications of any disease, nor is there any evidence whatever, that he had ever consulted a physician where he had lived for years.

It seems to me, therefore, that the evidence is entirely insufficient to justify me in holding that, at the time of the application for the insurance, the assured was suffering with this disease, as claimed by the defendants.

The plaintiff is entitled to judgment, with costs.

Matter of Hahlin.

N. Y. SURROGATE'S COURT.

IN THE MATTER OF THE ESTATE OF THOMAS HAHLIN.

Illiterate and incompetent executors — Power of surrogate to punish for non-compliance with decree — Practice as to letters testamentary.

The surrogate has power, under 3 Revised Statutes (6th ed., page 839, section 4), to punish an executor or executrix for non-compliance with a decree of such court, made on an accounting, directing certain moneys to be paid to a party named in the decree, by a fine or imprisonment, or both, where such misconduct was calculated to, or did, defeat the rights of a party in a matter pending in such court.

In case of inability to perform the requirements imposed by such decree, the court ordering such imprisonment may relieve the person so imprisoned, in such manner and upon such terms as it shall deem just and proper.

Though the scheme of the statute seems to contemplate the commitment first and the relief to be sought thereafter, in this case testimony was taken as to the ability of the executrix to perform the requirements imposed by the decree, to the end that the relief might be afforded without the formal imprisonment, if a proper case should have been made. The evidence established beyond doubt that the executrix was substantially without the means of performing the decree, and that her imprisonment could not aid the beneficiary.

Held, that the executrix, being widow of the deceased, and as dowress having an interest in the premises, that interest should be devoted to reimbursing the claimant; and that she should be committed to prison until she should pay the sum required to be paid by said decree, and costs, unless she should execute a release of so much of her interest in the premises, and to the rents thereof, as should be necessary to cover such sums.

By Laws of 1867 (*chap. 782, sec. 5*), a discretion is conferred upon the surrogate to refuse the application for letters testamentary or letters of administration of any person unable to read and write. Henceforth such applications will be refused unless specially ordered by the surrogate.

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By the statute (*Laws of 1877, chap. 208*), any person acting as executor or administrator, who converts to his own use, or fraudulently withholds any money, goods, property, rights in action, &c., belonging to an estate, is guilty of embezzlement, and punishable by *fine* and *imprisonment*.

October, 1877.

MOTION to punish Magdalena Hahlin, executrix, &c., of the last will and testament of Thomas Hahlin, deceased, for non-compliance with a decree of the surrogate, made on her accounting, August 17, 1877, directing her to pay certain moneys.

James G. White, proctor for legatees.

Joseph Bellisheim, proctor for executrix.

A. C. Anderson, of counsel.

CALVIN, *Surrogate*.—On the return of the attachment herein, the testimony taken shows substantially that the deceased left a tenement-house somewhat incumbered by mortgage, and a business of purchasing and sale of the broken meats of certain hotels in this city, and the general fragments remaining from their tables. That the will, as understood by the executrix, required her to continue the business so as to preserve it for her eldest son when he should become of age; that for some time she did continue the business, but, as she swears, it proving to be unprofitable, she disposed of it. While there is some testimony showing, or tending to show, that the business was profitable, she admits, under oath, that soon after the decease of her husband, and in 1869, she drew from the savings bank the sum of \$1,182, the amount of a legacy bequeathed to her in said will; that she has collected the rents of the house, but that she has expended all such rents and her own legacy in paying some debts of the testator, in paying interest on the mortgage, making repairs upon

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the premises, and in the support of herself and her children, so that she is now entirely destitute of the means by which to perform the decree. It is true that she appears not to have kept any account of her receipts and disbursements, and to have greatly neglected her duty as executrix, yet I do not doubt from the evidence, that she had, without authority, expended the money, and is now without means to comply with the decree. Under section 4, 3 Revised Statutes (6th ed.), 839, the prisoner may be committed to prison until such sum, with the costs and expenses of the proceedings, be paid. By section 20, same statute, it is provided that if the court shall adjudge the defendant to have been guilty of the misconduct alleged, and such misconduct was calculated to, or did, defeat, &c., the rights of a party in a matter pending in such court, it shall proceed to impose a fine or to imprison, or both, but in case of inability to perform the requirements imposed, the court ordering such imprisonment may relieve the person so imprisoned in such manner, and upon such terms as it shall deem just and proper. In view of this power, testimony was taken upon the question of the accused being able to perform the requirements imposed, in order that the relief might be afforded without the formal imprisonment, if a proper case should appear to have been made, though the scheme of the statute seems to contemplate the commitment first, and the relief to be sought thereafter. The natural repugnance to imprisoning a woman makes the proceeding peculiarly unwelcome and embarrassing; yet while the law provides for her appointment to such places of trust, I see no good reason why she should not be held to the same strict accountability as males. It very often occurs that an administratrix or executrix is called to account, who has used the funds of the estate for the support of herself and family, entirely regardless of the rights of creditors, heirs, or next of kin or legatees, and who seem to suppose they have done right; but a still greater grievance, as well as inconvenience, arises in very many cases from the absence of any account

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whatever of the proceedings of the representatives of estates, resulting frequently from their inability to read and write; and, while I am aware that it has been the custom of this office for many years to issue letters to wholly illiterate persons, while with very rare exceptions the settlements of the estates they have represented have been attended with great expense, uncertainty, dissatisfaction and family discord, as well as serious loss. In view of these well known facts, it seems to me that henceforth the spirit of section 5 of chapter 782 of the Laws of 1867 should be followed, and the discretion there conferred exercised, as a general rule, for the danger of granting letters to illiterate persons there suggested has been fully realized in practice. Indeed, it is self-evident, that where the law requires executors and administrators to render an account of their proceedings as such from time to time, it presupposes them to be capable of keeping and rendering such accounts. Henceforth, applications for letters testamentary and of administration by any person unable to read and write should be refused, unless specially ordered by the surrogate. The prevalence of trustees' defalcations has impelled the legislature of this state to enact a law calculated, by authorizing criminal prosecution, to enforce the honest performance by trustees of their delicate and responsible duties.

Chapter 208 of the Laws of 1877 makes the conversion to his own use, or the fraudulent withholding any money, goods, property, rights in action, &c., belonging to an estate or person, by any person acting as executor, administrator, trustee or guardian, embezzlement, and punishable by fine and imprisonment. It is desirable that this law should be called to the attention of all such trustees, and henceforth the letters issued should contain an indorsement by way of notice of its provisions. I have deemed it to be my duty to say thus much upon the general subject by way of calling attention to the duties and responsibilities of trustees, in the hope that it may result in a more diligent, faithful and honest administra-

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tion of their trusts. Now, as to the proper disposition of this motion, the delinquent executrix may congratulate herself that the law just cited is not retroactive. I entertain no doubt on the evidence that she is substantially without the means of performing the decree in this matter, and that her imprisonment cannot aid the beneficiary, whose funds have been misappropriated, and as the widow, as dowress, has an interest in the premises, it seems to me that that interest should be devoted to reimbursing the claimant. She should be committed to prison until she shall pay the sum required to be paid by said decree, and fifty dollars cost of this proceeding, unless she shall execute a release of so much of her interest in the premises and to the rents thereof as shall be necessary to cover such sums.

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SUPREME COURT.

DANIEL PRATT and another agt. HENRY W. SHORT and
GEORGE D. LEONARD.

Action on promissory note made by plaintiff to the order of, and indorsed by defendants and delivered by them to a safe deposit company who discounted same — Complaint contains count upon note and indorsement, also for money had and received — Defense, that the corporation exceeded its corporate powers in discounting the note, not good — Assignee proper person to sue.

In an action by the assignee of The People's Safe Deposit Company, incorporated under chapter 816 of Laws of 1868, page 1839, on a note made by V. C. to the order of, and indorsed by, defendants, and by them delivered to said deposit company, who took the same and paid the defendants the amount of the note, less the discount, at the legal rate of interest, the complaint contained a count upon the note and its indorsement, also for money had and received. The defense alleged that the corporation had no right, under its charter, to discount the note or to enter into the transaction of discount or loan set out in the complaint:

Held, that as the defendants were willing, at the time they presented the note to the company's officers and asked for the money upon it, to assume and act as though they believed the officers of the company had power to discount the note, it is highly inequitable to allow them, when called upon to pay back the money, to make good their promise, made at the time of the loan, to insist that the company exceeded its charter powers when it parted with its money.

The defendant cannot resist payment, on the ground that the corporation in taking the note had passed the bounds of their charter.

This court will not, in a collateral way, decide a question of *misuser* of a safe deposit company organized under a statute of this state. If they exceed their powers the remedy is with the legislature.

The invalidity of contracts made in violation of statutes is subject to the equitable exception, that although a corporation in making a contract acts in disagreement with its charter when it is a simple question of *capacity* or *authority* to contract, a party who has the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. The defendant cannot be permitted to repudiate a contract

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the fruits of which he retains. Assuming that the note and indorsement were void when taken by the corporation, then the same being avoided by the defendants, the money should be returned to the lender or its assignees, for, in equity, the money should never have been taken by these defendants upon a voidable or void security. The action for money had and received will lie under such circumstances. The transaction was not *malum in se*, and the lender may recover.

The assignees of an insolvent corporation have power to sue for and recover the assets of such insolvent corporation which have been improperly parted with by the corporation.

Onondaga Circuit, September, 1877.

ACTION upon a note made by Alex. Van Cleeck to the order of, and indorsed by, defendants, dated August 12, 1872, for \$1,900, payable seventy days after date. It was taken by the defendants and indorsed by them and delivered to the People's Safe Deposit Company of the State of New York, "which was incorporated under chapter 816, Laws of 1868, page 1839. The defendants received of said company \$1,873.03, and have never repaid the money. The note was protested. The plaintiff was duly appointed assignee, as alleged, of said company. Section 11 of said act provides, viz.: It shall be the duty of the board of directors to invest the capital stock of said corporation, and to keep the same invested in good securities, and it shall be lawful for the same to make such investments of the capital stock and of the deposits and funds accumulated by its business or any part thereof * * *

The proof does not show whether the money advanced to the defendants (1) was "capital stock of said corporation," (2) "deposits" or (3) "funds accumulated by its business." The money was advanced by the officers of said company over its counter, and the note taken upon a supposed discount thereof. The company was in the habit, and did prior to and at the time of this discount, of discounting short paper at the counter. The officers in charge so operated the business. There is no proof of any resolution of the board of directors authorizing such discounts. The plaintiff, as assignee, became vested with the note and assets of said corporation. The

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complaint contains a count upon the note and its indorsement; also, for money had and received. The defense alleges that the corporation had no rights to discount the note, to enter into the transaction of discount or loan set out in the complaint.

Daniel Pratt, for plaintiff.

George M. Kenneday, for defendants.

HARDIN, J. — The plaintiffs, as assignees, represent the creditors of the corporation, and as such take all the assets and rights of the corporation existing at the time of their appointment. The defendants having received the money upon the note, now insist it was not within the charter powers of the company to take the note by way of discounting the same to the defendants. The defendants were willing, at the time they presented the note to the company's officers and asked for the money upon it, to assume and act as though they believed the officers of the company had power to discount the note. It is highly inequitable to allow the defendants, when called upon to pay back the money to make good their promise made at the time of the loan, to insist that the company exceeded its charter powers when it parted with its money. The defense assumes that the corporation had no power to loan money upon the note in question. The act of 1868 incorporating the company, declared that the company shall possess the general powers and privileges, and be subject to the liabilities and restrictions contained in title 3 of chapter 18 of the first part of the Revised Statutes, so far as applicable thereto.

Section 1 of the third title of the Revised Statutes referred to authorizes corporations "to hold, purchase and convey such real and *personal estate* as the purposes of the corporation shall require, not exceeding the amount limited in its charter." There was no proof given in this case that the personal estate — the note — was not taken within the purposes of the corporation, and was not required to invest its deposits or to invest "funds accumulated by its business."

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But if we assume, as do the defendants, that the discounting of the note was not taken as an investment in the enumerated sections referred to in the eleventh section of the act, then it becomes important to determine whether it was prohibited from taking the note.

There is no express prohibition in the act of 1868.

Section 3 of the third title of the Revised Statutes provides that "no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated." It seems one of the powers conferred upon this corporation was to receive deposits and to keep them invested in a particular class of securities. But does such limitation apply to the "capital stock" of the corporation referred to in the first part of section 11 of the act of 1868?

The defendants further insist that section 4 of article 8 of the Constitution, applied to this corporation, prohibits it from exercising any of the powers of a corporation for "*banking purposes*." But considering that a special charter could not be granted under the Constitution as it was prior to the amendment of section 4 of article 8, in 1874, does it follow that the investment by the corporation organized under the act of 1868 could not invest "its capital" in good "securities," even though they were of no higher grade than promissory notes, well indorsed?

But if we proceed with the assumption made by the defendants, that the corporation was not authorized to loan upon the note and indorsement in suit, does it follow that the defendants can successfully raise the question and resist payment?

A similar defense was attempted fifty years ago, before the chancellor, in *Silver Lake Bank agt. North* (4 Johns. Ch., 370), and repudiated by the chancellor. It was there claimed that the plaintiffs had passed the bounds of their charter in taking a mortgage upon a loan. The chancellor said: "If this objection was strictly true, in point of fact, I should not readily listen to it. Perhaps it would be sufficient for this

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case, that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments, *and if they pass the exact line* of their power, it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter than for this court, in a collateral way, to decide a question of misuser by setting aside a just and *bona fide* contract." A like defense was attempted in *Glass Company* agt. *Dewey* (16 *Mass.*, 102). The court said: "The defendant cannot resist payment on this ground, but the legislature may enforce the prohibition by causing the charter to be revoked when they shall determine that it has been abused;" and doubtful power exercised by a corporation was held valid in *Moss* agt. *Rapier Lead Mining Company* (5 *Hill*, 137). In that case judge BRONSON dissented, but complaining of it, was constrained to follow it, in *State of Indiana* agt. *Woram* (6 *Hill*, 37). Judge DENIO, states the same doctrine in *Palmer* agt. *Lawrence* (8 *Sand. S. C.*, 174), says: "It would be in the highest degree inequitable and unjust to permit him to rescind a contract, the funds of which he retains and can never be compelled to restore." The principle was asserted in *Steam Navigation Company* agt. *Weed* (17 *Barb.*, 380). Sedgwick on Statutory and Constitutional Law (*page* 90) says: That the invalidity of contracts made in violation of statutes is subject to the equitable exception that although a corporation in making a contract acts in disagreement with its charter when it is a simple question of *capacity* or *authority* to contract. Assuming either on a question of regularity of organization or a power confirmed by its charter, a party who has the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the profit of which he retains." This principle is cited and approved by justice SWAYNE, in *Township of P. G.* agt. *Talcull* (19 *Wall.*, 678, 679). This principle was applied by me two years ago

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to the Skaneateles Savings Bank cases, against a borrower who set up some want of power in the bank to take notes, and the cases were sustained, the general term in this department affirming judgments in favor of the bank.

Upon another ground the plaintiffs are entitled to recover the money advanced to the defendants.

If it be assumed, as is the argument of the defendants, that the note and indorsement were void when taken by the corporation, then the same being avoided by the defendants, the money should be returned to the lender or its assignees, for, in equity, the money should never have been taken by these defendants upon a voidable or void security. The action for money had and received will lie under such circumstances. The transaction was not *malum in se* and the lender may recover (*Tracy agt. Talmage*, 14 N. Y., 162; *The Oneida Bank agt. The Ontario Bank*, 21 *id.*, 490). The last case was approved by HUNT, J., in *Mayor agt. Ray* (19 Wall., 484), and he points out the distinction between cases *ultra vires* and cases prohibited by law, and that class of cases where the borrower has received and actually retained the money. The case in 7 Wendell, 31, cited by defendants, shows the defendants did not have any of the money, and, therefore, it differs from this case. In case 19 Johnson 1, the court at the close of the opinion seems to favor the right of recovery for money had and received.

For the power of the plaintiff to recover the assets which have been improperly parted with by the corporation, see 48 Barbour, 463; and 5 Abbott (N. S.), 9; and opinion of GROVER, J., *Gillet, receiver, agt. Phelps* (13 N. Y. [3 Kern], 114); act of 1858, chapter 314. These views lead to the conclusion that the defense attempted is unavailing here to the defendants, and that the plaintiffs, as assignees, are entitled to recover upon the note and the amount thereof with interest and expenses of protest, or for money had and received, to the extent advanced by the corporation to the defendant, with interest and costs of this action.

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N. Y. COMMON PLEAS.

SAMUEL H. RANDALL agt. H. KINGSLAND, LEONARD & Co.

Attorney's fees — Reference — Long account.

Plaintiff moves for a reference of an issue joined upon his claim for services rendered as attorney and counsel for the defendants. His claim, as presented by his bill of particulars, is predicated upon almost daily charges, mainly for consultations with his client and in the services rendered in this employment, thus dividing and splitting up his claim into about 100 items, which is alleged to constitute a long account:

Held, that such a system of exacting compensation for services as managing attorney in any particular transaction, unless expressing matter of agreement between the parties, would necessarily result in a great unfairness, as entirely a departure from any just estimate of the value of an entire service in an entire though continuing employment.

Held, also, that it is not a proper case for a reference. The services rendered under such an employment, even if the subject of charges upon the "*quantum meruit*" for each instance of attention given to it, would, at most, partake of the character of a bill of goods sold and delivered under the same order, although consisting of numerous items at specific prices delivered at the same or different times. The whole transaction would constitute but one item in a long account.

At Chambers, October, 1877.

ROBINSON, J. — Plaintiff moves for a reference of an issue joined upon his claim for services rendered as attorney and counsel for the defendants in some four or five different transactions. As to the subject of the principal of these demands in which plaintiff claims to have been thus engaged, which appears to have been the settlement of an account relating to the estate of Dr. Kingsland, and which progressed during the months of May, June, July and August, 1877, the plain-

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tiff's claim, as presented by his bill of particulars, is predicated upon almost daily charges, mainly for consultations with his client and in the services rendered in this employment, and he divides or splits up his claim into about 100 items and mainly for daily consultations, &c.

It is upon such a bill of items or particulars, alleged to constitute a long account, that this motion is founded. It may well be that an attorney, from prudential considerations, out of a just spirit of remembrance of his services and of rendering a precise charge against his client, and having due regard to the time occupied in his service, may make such constant and precise entries in respect to them, but it is difficult to conceive that while engaged in such an entire and continuous employment to enable a client to effect the settlement of an account in which he is interested, how the attorney could, with any justice, split up his charge for his services into items of fair legal individuality for each time that he saw or conversed with his client on the subject, or each occasion when he gave the matter any consideration, or saw and conversed with an opposite counsel or wrote a note to him on the subject. Such a system of exacting compensation for services as managing attorney in any particular transaction, unless expressing matter of agreement between the parties, would necessarily result in great unfairness, as entirely a departure from any just estimate of the value of an entire service in an entire though continuing employment.

Physicians may well make charges for separate visits and an attorney for each separate deed drawn, or consultation or service rendered, as to each separate transaction in which he is engaged for his client; but the character of such charges as are presented by the plaintiff's bill of particulars of counsel fees for consultation with client, day by day, in such an employment, if not entirely unknown to the profession, is so unusual that it cannot but lead to the suspicion that the whole array of charges was designed to effect some ulterior purpose. So far as it was directed to procuring its recognition as furnish-

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ing a basis for a claim that it constituted a long account and to aid in an application for a reference on that ground, it fails to effect any such object.

The services rendered under such an employment—even if the subject of charges upon the *quantum meruit* for each instance of attention given to it—would, at most, partake of the character of a bill of goods sold and delivered under the same order, although consisting of numerous items at specific prices, delivered at the same or different times. The whole transaction would constitute but one item in a long account. Even if the claims were justly sustainable upon any such system of charges for every incident connected with the controversy in which the attorney's attention to the matter was exacted or given—as plaintiff necessarily is the main witness to establish each item—no such embarrassments as attend a long accounting can, in this case, be supposed necessarily to call for a reference to relieve the court from a protracted trial before a jury; and considering the character of the claims made, irrespective of other considerations, I regard that mode of trial of the merits of the demand as peculiarly appropriate.

Motion for reference denied, with ten dollars costs to defendants to abide the result.

Matter of Gessner.

SUPREME COURT.

In the matter of NELSON A. GESSNER.

Arrest on warrant of police magistrate—Effect of indictment found by grand jury after examination has been commenced before such magistrate—Bail pending examination.

The statute which defines the course of proceedings before a police magistrate or other officer authorized to issue a warrant for the arrest and apprehension of criminal offenders (3 R. S. [5th ed.], page 993, &c.), is mandatory in all its requirements. A duty is thereby devolved upon the officer who issues the warrant, which he must discharge.

When the prisoner is brought before the magistrate by the warrant which he issues upon a proper complaint and supported by evidence, he is *commanded* (the word used in the statute is "shall") to "proceed, as soon as may be, to examine the complainant and the witnesses produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate shall deem pertinent." The magistrate *must* reach a conclusion whether there is or is not probable cause for charging the prisoner with the crime.

A bill of indictment found by a grand jury against a prisoner after an examination has been commenced before a magistrate authorized to issue a warrant of arrest, is not expressly declared to be a *supersedeas* of the powers and duties of the magistrate, and it is not so inconsistent with a continuance thereof as so to operate by necessary implication, nor can a warrant issued upon it take the prisoner from the jurisdiction of such magistrate until his statute duties have been fulfilled.

The power to admit a prisoner to bail pending an examination before a police justice is, by the act of 1876 (*chapter 21*), conferred upon the magistrate before whom the proceedings are being held.

New York Chambers, September, 1877.

PROCEEDINGS by *habeas corpus* to inquire into the cause of the detention of Gessner.

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John Graham and *C. Bainbridge Smith* for prisoner.

Mr. Herring and *Wm. V. Leary* for people.

WESTBROOK, J. — To the writ of *habeas corpus* issued and served upon him, the warden of the city prison returns that he holds the prisoner, Nelson A. Gessner, under two warrants of commitment, one of Patrick G. Duffy, a police magistrate of the city of New York, committing said Gessner pending an examination upon a complaint charging him with the crime of forgery, and the other a bench warrant from the court of sessions of the county of New York, issued upon an indictment found by the grand jury of said court, and accusing him of the same crime.

The proof shows that on the 22d day of August, 1877, a complaint was made to the said Mr. Justice Duffy, charging the prisoner with forging and uttering a check upon the Third National Bank of New York, bearing date December 8, 1876, purporting to be made by Winslow, Lanier & Co., for the sum of \$26,668.75, and payable to the order of H. C. Friedman & Co. Upon this charge a warrant was issued, and the prisoner was brought before the justice. On the thirtieth day of August the examination before the magistrate was commenced, and, against the protest of the prisoner's counsel, such examination was postponed from said day (Thursday) to the following Monday morning. The adjournment was made at the request of Mr. Herring, the assistant district attorney, who represented the people before the magistrate. On Monday morning the prisoner and his counsel again appeared before the justice, when Mr. Leary, also an assistant of the district attorney, asked, on account of the alleged official duties of Mr. Herring, a further adjournment of the examination until the afternoon of that day. Although the prisoner's counsel objected, the application was granted, the justice declaring, however, that he would then continue the examination "as long as it was sunlight, and go on from

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day to day until it was finished." To the suggestion of the prisoner's counsel that it was understood the examination should go on in the afternoon, Mr. Leary assented. At three o'clock, P. M., or a little after, the magistrate took his seat, the prisoner and his counsel being present, when Mr. Herring stated that "a bill had been found by the grand jury, and that ended the power of the justice." The justice coincided in the view so far as to deliver over the prisoner to the officer having the bench warrant, and finally, on the urgent application of the prisoner's counsel, adjourned the examination before him to the twenty-eighth of September, instant, to give them an opportunity to relieve the prisoner from the arrest under the bench warrant issued by the court of sessions. Upon the return of Mr. justice Duffy to the writ of *certiorari*, the return of the warden of the city prison to the writ of *habeas corpus*, and the evidence taken upon this hearing, from which the foregoing facts appear, the prisoner's counsel ask, not that the prisoner should be discharged from all custody, but that he should be relieved from imprisonment under the bench warrant, in order that the justice who issued the other commitment, under which the prisoner is detained, can proceed with the examination begun before him, as the statute, according to the claim of prisoner's counsel, directs. The relief which the prisoner asks depends upon the effect, if any, which an indictment found, after an examination has been commenced before a magistrate, has upon such a proceeding.

The course of procedure before an officer authorized to issue a warrant for the arrest and apprehension of criminal offenders is clearly defined by statute (3 R. S. [5th ed.], 998, &c.). When the prisoner is brought before him by the warrant, which he issues upon a proper complaint and supported by evidence, he is commanded (the word used in statute is "shall") to "proceed as soon as may be to examine the complainant and the witnesses produced in support of the prosecution, on oath, in the presence of the prisoner, in

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regard to the offense charged, and in regard to any other matters connected with such charge, which such magistrate shall deem pertinent" (3 *R. S.* [5th ed.], 995, sec. 14). Provision is then made for the examination of the prisoner and for the presence of counsel in his behalf, and it is then (sec. 17) declared, "after the examination of the prisoner is completed, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination." After giving various other directions touching the proceeding, by sections 20 and 21, the magistrate must reach a conclusion whether there is or is not probable cause for charging the prisoner with the crime; and if he thinks there is not, he must discharge the prisoner; but if he thinks there is, he "shall bind by recognizance the prosecutor and all the material witnesses against such prisoner, to appear and testify at the next court having cognizance of the offense, and in which the prisoner may be indicted."

It will be observed that the statute is mandatory in all its requirements. A duty is thereby devolved upon the officer who issues the warrant, which he must discharge. No person, after a complaint is made and warrant issued, so represents the people as to be able to withdraw the proceeding and the complaint. The magistrate is directed to do certain things, and he must do them, unless some statute direction relieving him from their performance can be found. The counsel for the people do not claim that there is any express provision of our statute law which makes the finding of an indictment a *supersedes* of the powers and duties of the magistrate; but they argue because a grand jury can indict, it follows that the magistrate cannot further proceed. If the indictment is conceded to be regular, it is not seen how the further conclusion follows. It is true, that the discharge of the prisoner by the magistrate is no bar to an indictment, but the effect of the decision, when made, and even its confessed uselessness, if that be conceded, does not and cannot absolve a magistrate from doing what the law in plain terms declares

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he must do. To all arguments founded upon the alleged unprofitableness of the examination after an indictment is found, it is answered that courts and magistrates cannot excuse themselves from complying with statute mandates because, in their opinions, such requirements can lead to no practical good. The needlessness of a continuance of an examination after indictment is, however, not conceded; but, on the contrary, its completion is deemed a most valuable and substantial right of the accused. By it he will be informed as to the evidence and witnesses by which and whom the charge is to be substantiated, the value of which information even the unprofessional mind can plainly see, and of which the procurement of the bill of indictment was designed to deprive him.

Conceding, then, the mandatory terms of the statutes under which Mr. justice DUFFY was acting when his proceedings were arrested by the service of the bench warrant from the court of sessions, it follows that the stoppage of such examination was unauthorized and illegal. That an official duty once begun, which the plain terms of the written law require to be continued up to a certain result, must be so continued, is too clear for argument. It is equally clear that he who is so charged with official duty has full power to execute and discharge it, and he must so execute and discharge it. If he must, then how can any court, or process issued thereby, arrest his action and deprive him of his jurisdiction, unless the right so to do is expressly or by necessary implication conferred? The finding of a bill of indictment by a grand jury is certainly, as conceded, not an express *supersedeas* of the examination by the magistrate, and it is not so inconsistent with a continuance thereof as so to operate by necessary implication. For these reasons, hastily penned, the prisoner, Nelson A. Gessner, must be relieved from the imprisonment on the bench warrant and remanded to the custody of the warden upon the warrant of Mr. justice DUFFY, to the end that such magistrate may discharge the duty devolved upon him by law.

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This conclusion which has been reached is more than sustained by the learned opinion of that most eminent jurist, the late judge EDMONDS, *In the Matter of Samuel Drury and Samuel Drury, Jr.*, a copy of which has been furnished to me. That judge held that an indictment procured pending an examination was "irregular and void," because when thus obtained it was "in fraud of the law." Without going to the extent of holding, as judge EDMONDS did, that the indictment found against Gessner should be quashed by the court having jurisdiction over it, it is held that a warrant issued upon it cannot take the prisoner from the jurisdiction of Mr. justice DUFFY, until his statute duties have been fulfilled. No reported case has been produced (whilst some exist denying the propriety of a motion to quash an indictment, because found pending an examination) which decides that an indictment found arrests the magistrate's proceedings.

In the absence of any such case, my own convictions must be followed, which are entirely clear, and lead me to the conclusion already announced. By the course which has been directed, every right of the people is preserved, and it is but just, that every fair and legitimate opportunity of defense which the law affords should be given to the accused. It is true the guilty should be punished, but to do so, the legal safeguards, which oftentimes shield the innocent, should not be broken down, that summary punishment may be inflicted in accordance with popular clamor or the fiery zeal of interested accusers.

Application has also been made to this court to admit the prisoner to bail pending the examination before Mr. justice DUFFY, which it has been held must proceed. The act of 1876 (*chap.* 21) confers that power upon the magistrate, and it is the only one, so far as I have discovered, which provides for bail pending the examination. The provisions of section 58, of page 879 of 3 Revised Statutes (5th ed.), apply only to the case of a party "legally committed for any criminal offense," (meaning a commitment after examination, and

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those of section 31, page 1001, of same volume, to those cases in which then existing statutes provided for bail. Without formally deciding that this court is without power to bail the prisoner, it is better, as the power of the magistrate in this respect is undoubted, to confide that duty to Mr. justice DUFFY. In its exercise he will not forget that the "bill of rights" of our state expressly declares that "excessive bail ought not to be required." It is conceded that the crime of which the prisoner is accused is that of forgery in the third degree, and whilst no dictation is made to him as to his duty, it is assumed that it will be so discharged as to protect the people, and yet not be oppressive and unjust to the accused.

ERRATUM.

In the case of *Hayes agt. Buckley* (*ante*, page 173) in place of "R. D. Jones" read "R. O. Jones," and on page 186, thirteenth line from bottom, for "verdict" read "*judgment*."

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CONTAINING THE WHOLE OF

53 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 10 HUN, AND 64 AND 65 N. Y. REPORTS.

ACCOUNTING.

1. There is no power to deprive a creditor of the right to demand and insist upon an account being rendered by an assignee under the state law. (*Matter of Herman, ante, 377.*)
2. The answer of the assignee that after the assignment a petition had been filed in bankruptcy, and a composition effected by the assignor, whereupon he surrendered to them the assigned estate, presents no reason why he should not be required to render his account. (*Id.*)
3. The creditors, by virtue of the assignment and its acceptance by the assignee, acquired certain vested rights in the assigned estate, of which they could not be divested by the bankruptcy proceedings. (*Id.*)
4. They could only be divested of these rights either by a bill in equity, or by their consent in the resolution of the creditors accepting the composition that the assigned estate should be returned to the assignor. (*Id.*)
5. Although the petitioning creditors presented their claims and proofs of claims before the register in bankruptcy, and appeared during the examination and proceeding before the register, the right to an accounting is not affected thereby. (*Id.*)

When action maintainable for, under resulting trust. (*See Helms agt. Goodwill, 64 N. Y. [Mem.], 642.*)

ACCOUNT STATED.

1. Where the complaint is so framed that the plaintiff must recover, if at all, upon an account stated, although a number of items entered into such account, an order of reference is unauthorized. (*Rowell agt. Giles, ante, 244.*)
2. The only proof necessary or proper in such a case must relate simply to and must establish the liquidation and settlement of the amount of defendants' liability at the date when such statement and settlement are claimed to have been made. (*Id.*)
3. The case does not require the "examination" of the account containing the items which entered into such account, thus alleged to have been stated and settled, but only the determination of the issue as to whether such account was or was not stated and settled in the manner and to the extent alleged in the complaint. (*Id.*)

ACTION.

1. In an action between partners, in order to justify a recovery in favor of the plaintiff for any "specific sum" there should have been

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- a balance struck, or agreed upon, as due from the defendant to the plaintiff. (*Covert* agt. *Henneberger*, ante, 1.)
2. An action for such balance cannot be connected with an action for "an accounting," unless there be in the complaint appropriate allegations. (*Id.*)
 3. The court is justified in looking at the prayer for relief in order to ascertain the plaintiff's view of his own cause of action. (*Id.*)
 4. To entitle a plaintiff to maintain an action against the sureties on an undertaking given in pursuance of section 348 of the Code for the purposes of an appeal, notice of entry of the order or judgment affirming the judgment appealed from must be served upon the adverse party ten days before the commencement of the action. (*Rae* agt. *Harteau*, ante, 25.)
 5. The commencement of the action before the lapse of ten days after notice, is fatal to the recovery. (*Id.*)
 6. This notice, like all other notices required by the Code, must be given in writing, and must be so explicit as plainly to give the information required by the statute. (*Id.*)
 7. The decision upon an appeal taken by the principal can, in no way, be effectually decided or disposed of by an "order," but only by a judgment of affirmance duly perfected. (*Id.*)
 8. An order is but a decision upon a motion, and is expressly distinguished from a judgment which is defined as the final determination of the rights of the parties. A judgment is to be entered in the judgment book and perfected by the filing of a judgment roll from which the right of appeal from a judgment would begin to run. (*Id.*)
 9. Notice of the judgment so perfected is the notice required by the statute (*Code*, sec. 348) to be served on the adverse party ten days before the commencement of the action on the undertaking. (*Id.*)
 10. An action or bill in equity may be maintained against a corporation, on behalf of a holder of its stock, to compel a transfer to him by the company on its books. (*Crushman* agt. *Thayer Manf. Jewelry Co.*, ante, 60.)
 11. A court of equity, in a proper case, may decree the transfers of shares of stock on the books of the company. (*Id.*)
 12. The customary action by a party injured by the refusal of a corporation to make transfer to him, is an action at law for damage in which he is entitled to recover its full market value. (*Id.*)
 13. But where the shares of the capital stock of a corporation have no market value upon which an assessment of damages in an action at law could be based, their value depending upon the future operations of the company, the company having it in their power to suspend its operations *in toto* so as to make the stock of no value, and thus decrease the law damage to a mere trifle, the capital stock being limited and not easily, if at all, procurable in the market, the transfer of the shares owned by plaintiff being effected in fraud of her rights by her husband and one Beales, the transferee, and made on the books of the company by the officers of the company in bad faith, the original certificates not being produced nor properly accounted for, and the transfer being made to one of the officers of the company:
Held, that the equitable power of the court may be invoked and the company compelled to trans-

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fer the shares of stock to plaintiffs on their books. (*Id.*)

14. A widow can maintain an action to obtain a construction of her husband's will. (*Keteltas* agt. *Keteltas*, ante, 65.)

15. Certain lands of the plaintiff with the buildings thereon, were, by statute, exempt from taxation, the same being used exclusively for public worship.

Held, that the plaintiff could maintain an action in equity to set aside a tax imposed thereon, and a sale made for its non-payment, no deed having been executed to the purchaser, the invalidity of the tax not appearing on the face of the assessment, but required to be established by extrinsic facts. (*Congregation Shaarai Tephila* agt. *Mayor, &c.*, ante, 213.)

16. Where a party brings an action for money had and received, for the purposes of the action, he waives a tortious receiving or withholding the money. (*Gopen* agt. *Crawford*, ante, 278.)

17. The character of the action is determined by the complaint, and not by the form of the summons. (*Id.*)

18. An allegation that the defendant "received the money as an attorney at law," does not necessarily make his refusal to pay over wrongful. He may still have a valid ground for holding on to the money. To have that effect, it must be alleged that he wrongfully withholds the money. (*Id.*)

19. To an action brought against an attorney at law for moneys received by him as such, he may set up by way of counter-claim a demand in his favor against the plaintiff for services rendered. (*Id.*)

20. Where a husband, having obtained from his wife, by fraud and duress, a confession, in writ-

ing, that she had committed adultery, commenced an action against her for divorce upon the ground of adultery:

Held, in an action by the wife to restrain the use of such confession in said divorce action, that it would be so great an injustice to allow the defendant to use as evidence a confession obtained under such circumstances that a court of equity must interfere.

Held, also, that the wife has such an interest in this confession that she can maintain an action to restrain its use in this way. She has the same interest in this confession that she would have in any letter which might be written by her, and she could maintain an action to restrain the improper publication of any letters which she might have written. (*Callender* agt. *Callender*, ante, 364.)

ADJOURNMENT.

1. A judge or referee in supplementary proceedings has the power of adjournment the same as a master in chancery had when acting under an order for the examination of a debtor in a creditor's suit, and he may adjourn the proceedings from time to time, even though the debtor to be examined refuses to consent thereto. (*Kaufman* agt. *Thrasher*, 10 *Hun*, 496.)

ADMISSIONS AND DECLARATIONS.

1. Where, upon the trial of an action, a plaintiff desires to avail himself of an admission or averment contained in an answer, he must accept the admission or averment as an entirety; he cannot except a portion of such admission or averment and reject the remainder. (*Goodyear* agt. *De La Vergne*, 10 *Hun*, 587.)
2. The declarations of a principal, made subsequent to the act to

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which they relate, and not as part of the *res gestæ*, are not competent evidence against his surety. (*Hatch agt. Elkins*, 65 N. Y., 480.)

AFFIDAVITS.

1. To give proceedings for the foreclosure of a mortgage by advertisement under the statute (2 R. S., 545, *et seq.*) any validity, service of notice of foreclosure and sale upon the mortgagor, in the manner prescribed by the statute (*sec. 8*), is absolutely necessary; and to give the affidavit of service required by the statute (*sec. 10*), or its record or a certified copy thereof, the effect of presumptive evidence (*sec. 12*), it must show such service. (*Mowry agt. Sanborn*, 65 N. Y., 581.)

2. In an action of ejectment wherein the plaintiff claimed title under a statutory foreclosure, the affidavit of service of notice upon the mortgagor was to the effect that it was served by mail, addressed to him at S., where, "as deponent is informed and believes," he at the time resided, *held* (EARL, C., *dissenting*), that the affidavit did not furnish presumptive evidence of service; that to have that effect the affidavit must be of a person who speaks from personal knowledge. Mere information and belief is insufficient. (*Id.*)

AMENDMENT.

1. After issue joined, in an action brought to recover the possession of personal property, the plaintiff died, and thereafter the action was revived in the name of his widow, as executrix. Upon the trial, it appeared that the husband had no title to the property, but that the same was owned by the wife in her own right. *Held*, that the court had no power to amend the summons and complaint by striking

out the word "executrix," and thus allow the plaintiff to recover by virtue of her own title to the property. (*Phillips agt. Melville*, 10 Hun, 111.)

2. In allowing amendments to answers, the court does not now regard the character of the defense sought to be interposed. Accordingly, *held*, that an order allowing an answer to be amended by setting up the defense of usury was properly granted, and should be affirmed. (*Barnett agt. Meyer*, 10 Hun, 100.)

ANSWER.

1. *It seems*, a motion to strike out matter in an answer as irrelevant and redundant should be granted where the whole is but matter of evidence, and cannot be regarded as any approach to a matter of pleading. (*Bangs agt. Ocean National Bank*, *ante*, 51.)

2. Where a plaintiff does not reply to an answer setting up counter-claims, it is an admission that they were due and owing by plaintiff, and the defendant may avail himself of such admission. (*Randolph agt. Mayor, &c., of N. Y.*, *ante*, 68.)

3. But the defendant waives this advantage if he goes into proof of the counter-claim, and by such proof shows that it could not properly have been set off against plaintiff's demand. (*Id.*)

4. Where the answer sets up by way of counter-claim certain transactions of plaintiffs with the defendant and his copartner, who is not a party to the action, a demurrer to the answer will be sustained. (*Baldwin agt. Berrian*, *ante*, 81.)

5. Action brought upon a Louisiana judgment obtained in 1860 upon

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an attachment of defendant's real property, the "citation," *i. e.*, summons, having been served at the defendant's domicile in defendant's absence. The answer here set up: First. A general denial of the judgment (on information and belief). Second. Lack of personal service of process on defendant. Third. That defendant never appeared in person or by attorney in the Louisiana action, nor litigated nor defended the same either in person or by attorney, nor did he have any knowledge of the Louisiana suit until long after the judgment. Fourth. *Nihil debet.*

Held, that the answer, as a plea in bar, is fatally defective. In order to make the answer sufficient, there should have been added to it allegations showing that the defendant was not domiciled in Louisiana or subject to the laws of that state, or that the judgment is not binding there, or that it is contrary to natural justice. (*Cassidy agt. Leech, ante, 105.*)

6. A foreign judgment rendered against a citizen of the state in which it is pronounced, stands on a very different footing from a foreign judgment against one who owed no allegiance to, and was not subject to the jurisdiction of the state in which it was rendered. (*Id.*)

7. In an action by an incorporated bank, where the complaint contains no allegation that the plaintiff is a corporation, or entitled to sue as such, the objection is properly taken by answer. (*National Bank of Utica agt. Wells, ante, 242.*)

8. A demurrer can only be interposed where it affirmatively appears upon the face of the complaint that the plaintiff has not legal capacity to sue. (*Id.*)

9. When a defendant demurs to a complaint upon the ground that it does not state facts sufficient to

constitute a cause of action, and afterwards answers the complaint, the answer is a waiver of the demurrer. (*Musgrave agt. Webster, ante, 367.*)

See ASSIGNEE.

Mutter of Herman, ante, 377.

10. An objection that the necessary parties are not before the court must be raised by the answer. If not so raised it must be deemed waived, and cannot be urged upon a motion to vacate an injunction. (*Astie agt. Leeming, ante, 397.*)

ANTI-NUPTIAL AGREEMENT.

1. Where, after marriage, the husband paid the interest on a mortgage on the separate property of his wife, and for its benefit, in pursuance of an agreement between them before marriage, that if he occupied a portion of her premises after marriage, as an office for his business as a physician, he would pay interest on the mortgage in lieu of rent.

Held, that the agreement was valid, and that the payment was not in fraud of the creditors of the husband. (*Odell agt. Mylins, ante, 250.*)

2. An ante-nuptial contract of a woman that she will not claim her dower in the event of her intended marriage is contrary to public policy, and unless founded upon the consideration of some provision for her in lieu of dower, will be ineffectual both at law and in equity. (*Curry agt. Curry, 10 Hun, 366.*)

3. This rule is not changed by chapter 375 of 1849, providing that all contracts made between persons in contemplation of marriage, shall remain in full force after such marriage takes place. (*Id.*)

4. Such intended marriage, even though solemnized in reliance

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upon the agreement, does not of itself furnish a sufficient consideration to support the same. (*Id.*)

5. *Quare*, as to the power of the court to inquire into the adequacy of the provision made for the wife, and as to the extent to which such inquiry can be carried. (*Id.*)

APPEAL.

1. The decision upon an appeal taken by the principal can, in no way, be effectually decided or disposed of by an "order," but only by a judgment of affirmance duly perfected. (*Rae* agt. *Hartman*, ante, 25.)
2. An order is but a decision upon a motion, and is expressly distinguished from a judgment which is defined as the final determination of the rights of the parties. A judgment is to be entered in the judgment book and perfected by the filing of a judgment roll from which the right of appeal from a judgment would begin to run. (*Id.*)
3. An appeal lies to the general term of the supreme court, from an order of the special term, discharging a petitioner from imprisonment on execution. It is a special proceeding, as defined by sections 1, 2 and 3 of the Code, but such order is not final and conclusive in the sense that it cannot be appealed from. (*Per* *EARL, J.*; *FOLGER, RAPALLO* and *ANDREWS, JJ.*, concurring; *ALLEN* and *MILLER, JJ.*, dissenting.) (*Matter of Brady*, ante, 128.)
4. The application for the discharge of an imprisoned debtor, under the fifth article of title 1, chapter 5, part 2 of the Revised Statutes, must be made to certain officers specified, and cannot be made to any court; and an order by such officer is not appealable either to general term or to the court of appeals. The remedy is by *certiorari*. (*Matter of Roberts*, ante, 199.)
5. Where, in an action in a district court, the defendant appeared and joined issue, the cause being adjourned, and upon the adjourned day the defendant failed to appear, the plaintiff took judgment by default:
Held, that an appeal would lie to the general term of the common pleas to reverse the judgment upon error. (*Pultz* agt. *Dickey*, ante, 270.)
6. In such a case the plaintiff, though the defendant failed to appear upon the adjourned day, is bound to establish his cause of action by evidence, and if he has not done so the judgment will be reversed. (*Id.*)
7. Nor is a defendant, in such a case, required to make a motion in the court below to open the default, as such an application is made to the favor of the court and is one in which conditions may be imposed; but if the judgment was rendered without sufficient evidence to warrant it, the defendant has the right to have it reversed by an appeal to the tribunal that has the authority to review it. (*Id.*)
8. Although a review of both the law and the facts of a case tried by a judge or referee may be had at general term, yet, if no error be shown, the findings of fact, like the verdict of a jury, should be deemed conclusive. (*Salomon* agt. *Moral*, ante, 342.)
9. On an appeal from action of the Utica common council, the original papers were filed with the county clerk in time, but the copies were not served until the twenty-first day after the second report of the commissioners appointed therefor had been filed. The objection is taken at the hear-

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ing of the appeal, that the appeal papers were not served in time:

Held that the respondent should have moved to dismiss the appeal, and not having done so and allowing a special term to pass, he waived his right. (*Matter of Schreiber, ante, 359.*)

10. An action by an attorney for services, where the defense is that the charges are exorbitant and oppressive, is referable under the statute; but whether it should be referred or not is *discretionary* with the court or judge before whom the cause is pending. (*Martin agt. Windsor Hotel Company, ante, 422.*)

11. The general term has the power to review such order of the special term, notwithstanding it is discretionary. (*Id.*)

13. It is only necessary that the order, to be appealable from the special to the general term, must affect a substantial interest—a matter of substance, and not of mere form, and it may be such an order and yet be *discretionary*. (*Id.*)

18. But such an order is not appealable to the court of appeals. (*Id.*)

14. A reference is not an absolute right in any case. Whether the court will exercise the power conferred of referring any action which the statute authorizes to be referred, depends upon all the circumstances of the case, and the exercise of the power in a given case, is reviewable by the general term, but *not* by this court. (*Id.*)

Appeal need not be taken from an interlocutory judgment or decree, but a motion may be made for a new trial, on a case and exceptions, under section 268 of the Code, when. (*See Bennett agt. Austin, 10 Hun, 451.*)

15. Upon an appeal from an order granting temporary alimony in an action for a divorce, the General Term has power to modify the order by reducing the amount allowed thereby. (*Collins agt. Collins, 10 Hun, 272.*)

From chamber order of county judge—can only be taken after order has been entered in the county clerk's office. (*See Pool agt. Safford, 10 Hun, 497.*)

16. Where a respondent seeks to restrict the general right to appeal to this court by applying the limitation prescribed by the amendment of 1874 to section 11 of the Code (*chap. 323, Laws of 1874*), it is for him to show that the subject-matter of the controversy does not exceed \$500. (*People agt. Horton, 64 N. Y., 58.*)

17. This action was brought to restrain the carrying on of a business; no sum of money was demanded in the complaint, nor was the value of the business stated in the pleadings; judgment was given for the defendant. The testimony showed the yearly value of the business to be more than \$500. *Held*, that plaintiffs were entitled to appeal to this court. (*Id.*)

18. In an action upon a policy of life insurance the defense was the falsity of various answers to questions in the application which were, by the terms of the policy, made warranties. After the defendant's counsel had, upon the trial, specified certain answers which he claimed to be false, on motion to dismiss, in exceptions to the submission of questions to the jury and in requests to charge, he requested the court to charge that upon the policy and the evidence the plaintiff could not recover any thing beyond the amount of the last premium. *Held*, that the general objection did not entitle defendant to raise

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- on appeal points as to the falsity of answers which were not specified, and as to which no question of law was raised and passed upon on the trial. (*Boos* agt. *W. M. L. Ins. Co.*, 64 *N. Y.*, 236.)
19. A general term has no power to review a case upon the facts on appeal from the judgment where the trial was by jury; the only mode in which the facts can be brought before it for review is by appeal from order of special term or circuit granting or refusing a new trial. (*Id.*)
20. In an action to recover damages for breach of contract, where plaintiff has recovered judgment allowing one item of damage claimed and rejecting another, he cannot retain the amount allowed and ask upon appeal for a re-trial as to the item rejected; if a reversal and new trial is granted, it must be of the entire judgment and claim. (*Wolstenholme* agt. *W. F. M. Co.*, 64 *N. Y.*, 272.)
21. This court has not authority upon affirmance of an order denying an application to vacate an assessment, to allow the petitioner a re-hearing in the court below, or to authorize him to renew his application upon further proof; it can simply so frame its judgment that it shall not be an obstacle to the petitioner obtaining relief in the proper form, *i. e.*, that the affirmance be without prejudice to an application to the court below for relief. (*In re Ingraham*, 64 *N. Y.*, 810.)
22. A refusal of a referee to pass upon an objection to evidence at the time it is offered and the receipt thereof, with a reservation of the question as to its admissibility until the close of the case, is improper, but is not necessarily fatal to the judgment (*CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.*) (*Lathrop* agt. *Brumhall*, 64 *N. Y.*, 365.)
23. Such a reservation is to be considered upon appeal the same as if the objection had been overruled and an exception taken, and if the evidence were proper or could not have affected the rights of the objecting party injuriously, the reservation is not ground for reversal (*CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting.*) (*Id.*)
24. An order quashing a writ of *habeas corpus* can only be reviewed upon appeal. A writ of error will not lie in such case. (*People ex rel.* agt. *Conner*, 64 *N. Y.*, 481.)
25. As to whether an order denying a motion to set off one judgment against another is reviewable here, *quære.* (*Stoift* agt. *Prouty*, 64 *N. Y.*, 545.)
26. Where, upon motion to punish, a party for contempt in violating an injunction, there is legal evidence sufficient to call for the exercise of the judgment and discretion of the court, its decision is not reviewable here. (*Mayor, etc.*, agt. *N. Y. and S. I. F. Co.*, 64 *N. Y.*, 623.)
27. It is within the discretion of the court of original jurisdiction whether, upon overruling a demurrer by defendant, he shall be allowed to answer over. (*Simson* agt. *Satterlee*, 64 *N. Y.*, 657.)
- Error in form of judgment not reviewable on, but to be corrected by motion. (*See Cagger* agt. *Lansing*, 64 *N. Y.*, 417.)
- Effect of release of sureties in undertaking on, as to purchaser of premises incumbered by the judgment appealed from. (*See Barnes* agt. *Mott*, 64 *N. Y.*, 397.)
- Order vacating order confirming report of railroad commissioner not reviewable here. (*See In re Application of N. Y. C. and H. R. R. Co.*, 64 *N. Y.*, 60.)

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Order requiring examination of party before trial not reviewable in this court. (*See Glenney agt. Steadwell*, 64 N. Y., 120.)

Extra allowance not reviewable. (*See Comins agt. Bd. Suprs. [Mem.]*, 64 N. Y., 626.)

Order refusing to punish for contempt and of reference, when not reviewable here. (*See Sutton agt. Davis [Mem.]*, 64 N. Y., 688.)

28. Where, in an action to set aside a conveyance by a debtor as made to hinder, delay and defraud creditors, the conveyance is found to be fraudulent and void and judgment is perfected, setting it aside and directing a sale of the lands by a receiver, the error, if any, in directing such sale, is not ground for an appeal, but is to be rectified by motion to correct the judgment. (*Cole agt. Tyler*, 65 N. Y., 78.)

29. It is not necessary in order to present upon appeal the point that the return to a summons in justice's court is insufficient to give jurisdiction, or that it does not appear that the appearance of another person for defendant was authorized, that these grounds should be specifically stated in the notice of appeal; a general statement therein as a ground for appeal that the justice had no jurisdiction is sufficient (*LOTT, Ch. C., and GRAY, C., dissenting*). (*Sperry agt. Reynolds*, 65 N. Y., 179.)

30. As to whether, when a motion for a nonsuit is made and granted upon an untenable ground, a good ground which might have been obviated had it been presented by further proof, can be availed of on appeal to sustain the decision, *quare*. (*Beckwith agt. Whalen*, 65 N. Y., 322.)

31. Where the proceedings of commissioners of highways, in laying out a highway, are brought up for review upon writ of *certiorari*,

this court, in reviewing the determination of the general term of the supreme court thereon, can only take notice of the facts stated in the commissioners' return. The affidavits upon which the writ was granted form no part of the return, and neither the facts therein stated nor the facts appearing in the evidence given before referees on appeal from the decision of the commissioners can be considered in determining whether the commissioners acquired jurisdiction. (*People ex rel. Becker agt. Burton*, 65 N. Y., 452.)

32. *It seems*, that on appeal from the determination of commissioners of highways laying out a highway no notice of the time and place of hearing the appeal before referees is required to be given to the owner or occupant of the lands to be taken. The only notice required to be given is to the commissioners and to one or more applicants for the road. (1 R. S., 518, sec. 87.) (*Id.*)

33. An owner who appears and is heard before the referees without objecting to their jurisdiction because of omission to serve notice upon him, cannot raise the objection on appeal from the decision of the referees. (*Id.*)

34. An order granting, denying, continuing or setting aside a preliminary injunction is not reviewable in this court, and the court will not entertain an appeal therefrom for the purpose of determining the right of plaintiff to maintain the action. (*Calkin agt. Man. Oil Co.*, 65 N. Y., 557.)

35. Where a judgment, entered upon the report of a referee, is reversed by the general term this court will not, for the purpose of sustaining the judgment, adopt a theory not set up in the complaint or broached upon the trial. (*Stapenhorst agt. Wolf*, 65 N. Y. 596.)

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36. In an action alleging a partnership between the parties (which was denied by the answer) and asking for an accounting, an order of reference was entered directing the referee, 1st. To hear, determine and report as to whether the partnership existed. 2d. Staying proceedings thereon to enable either party to move for a new trial at general term. 3d. If the referee found, or if upon the motion for a new trial it should be determined that a partnership existed, then that an accounting be taken by the referee. The referee reported that a partnership existed and directed an accounting. *Held*, that a motion at general term to set aside the report and for a new trial was proper, as was also an appeal to this court from the order of general term granting a new trial (*Code, sec. 268*). (*Johnson agt. Youngs, 65 N. Y., 599.*)

37. Where an order shows that the motion was granted upon questions of fact, every question of law and fact appearing in the record is open for review here. (*Id.*)

ARBITRATION.

1. Where an arbitration bond requires the award to be executed, ready for delivery to the parties, it requires the award to be executed in duplicate, so that each party may have one; either party, however, may waive this requirement as far as he is concerned, and if he consent to accept a copy, leaving the original for the opposite party, the latter cannot complain, and the award is valid, although but one is executed. (*Gidley agt. Gidley, 65 N. Y., 169.*)

ARREST.

1. Where defendant, in the fall of 1873, began business as a tobacco

merchant with a cash or available capital of less than \$2,000, purchased from plaintiffs in November, 1875, and January, 1876, tobacco to the amount of nearly \$4,000, and at the same time, or shortly after, purchased of various other parties large amounts of tobacco, and on February 7th, 1876, made an assignment returning his entire property, at a valuation of \$1,400, without any pretense of any loss by bad debts or otherwise since the date of his purchase from plaintiffs:

Held, that this purchase from plaintiffs without any pretended disclosure of the condition of his affairs, or any reasonable ground for expectation of meeting his obligations, was fraudulent. (*Wells agt. Selling, ante, 35.*)

2. Where, during the month of January previous to his assignment, the defendant obtained credits of various parties besides the plaintiffs to the amount of \$7,500 and fails to make any explanation as to its disposition or to show how it, together with what he previously possessed, culminated in the meager show of assets, at the time of his assignment, amounting to less than \$1,500 as estimated by himself:

Held, that he is thus shown, in the absence of any explanation, to have fraudulently disposed of his property with intent to defraud his creditors. (*Id.*)

3. Where the defendant disposed of \$3,800 to his uncle in the latter part of January, 1876, under an assumed indebtedness to him in that amount, the uncle depositing the same sum in bank to a newly-opened account on the third of February, the defendant reappearing on the first of March in full possession of the same business he had previously carried on under a general power of attorney from his wife, and with capital evidently afforded her by the uncle from the \$3,800 that had gone through

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the formal process of the payment of the debt to the latter:

Held, that this transaction of the assumed payment to the uncle of \$2,800 was a fraudulent disposition of so much of the defendant's property with intent to defraud his creditors. (*Id.*)

4. An action by a wife against her husband for a limited divorce on the ground of cruel and inhuman treatment comes within the definition of *injuries to the person*, mentioned in section 179 of the Code, and is one in which an order of arrest can properly be granted under the provisions of that section. (*Jamieson agt. Jamieson, ante, 112.*)

See POLICE JUSTICE.

Matter of Gessner, ante, 515.

ASSESSMENTS.

1. The municipal authorities of the city of New York are the agents of the property owners, and a bond of a contractor taken for the faithful performance of his contract is taken for their benefit, and in case of the non-fulfillment of the contract the bond should be collected, and the amount thereof applied in diminution of the assessment. (*Eno agt. The Mayor, etc., ante, 882.*)
2. An action may be maintained by a property owner to restrain the corporation of the city of New York from collecting an assessment without crediting him with the proportionate amount of a bond given by a contractor for the faithful performance of his contract, and which he failed to perform, the work under which being done by a subsequent contractor at a much higher rate. (*Id.*)

ASSIGNEE.

1. There is no power to deprive a creditor of the right to demand

and insist upon an account being rendered by an assignee under the state law. (*Matter of Herman, ante, 377.*)

2. The answer of the assignee that after the assignment a petition had been filed in bankruptcy, and a composition effected by the assignor, whereupon he surrendered to them the assigned estate, presents no reason why he should not be required to render his account. (*Id.*)
8. The creditors, by virtue of the assignment and its acceptance by the assignee, acquired certain vested rights in the assigned estate, of which they could not be divested by the bankruptcy proceedings. (*Id.*)
4. They could only be divested of these rights either by a bill in equity, or by their consent in the resolution of the creditors accepting the composition that the assigned estate should be returned to the assignor. (*Id.*)
5. Although the petitioning creditors presented their claims and proofs of claims before the register in bankruptcy, and appeared during the examination and proceeding before the register, the right to an accounting is not affected thereby. (*Id.*)
6. The courts, in the distribution of estates intrusted by law to their administration are, to a great extent, acting for absent creditors or unrepresented parties, who repose, with confidence, upon the judicial care and watchfulness of the courts of their interests. No right exists in such tribunal to sequester the money equitably belonging to others in lavish and injudicious allowances to trustees, or their attorneys or agents, engaged in such administration, or to counsel who appear in the proceeding for distribution, but they

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are bound to regard every dollar thus appropriated as involuntarily exacted and levied from its lawful owner for the necessary expenses of administration. (*Matter of Scott, ante*, 441.)

7. Motion to confirm the report of a referee appointed to examine into the accounts of an assignee, which proceeding for such an accounting originated upon the petition of a creditor of the assignor to the extent of some \$184. Upon the return of that application, the assignee obtained an order for a final accounting, and upon the return day the order of reference was made. The referee proceeded to take and state the accounts as required by the order of reference, and as authorized by the amendment to section 4 of the act of 1860 (*chap. 348*), as made by chapter 56 of Laws of 1875. Among other items awarded by the referee, and submitted to the court for its approval, are the following, viz.: *First*. That the counsel for the petitioning creditor, to whom less than \$150 was due, should be paid \$400 for his services. *Second*. That the special trustee, whose accounting was in a measure involved, and whose legal commissions, at the rate allowed by law to executors and administrators, amount to \$3,820.50, should be paid, as a compensation for his services, \$6,000. *Third*. To the assignee, instead of \$11,392.91, his legal commission at the like rate, "should, in consideration of the laborious nature of his duties, and the great skill and fidelity displayed by him," be paid the sum of \$40,000; and, *Fourth*, that the attorneys for the assignee, for services rendered by them *in the matter of the accounting*, "and preparation of reports of proceeding, petitions, for general citation, issue and service of same, and attendance in court and before referee," should (in addition to \$1,000 theretofore paid them by the assignee, and allowed for counsel fee in the

matter of the assignment) be paid the further sum of \$10,000.

Held, first, that as to the items in the claim for the petitioning creditor (whose debt is less than \$150) to an allowance of *four hundred dollars*, there is no law or principle of justice accepted or acted upon by the courts which justify any such award to him out of these trust funds. (*Id.*)

8. It does not appear that, in regard to the claim of the petitioning creditor, there was any dispute before the referee in respect to it which required a trial before him, and the proceeding he instituted was superseded by the intervention of the assignee under claim of right to a final accounting, and with it the claim of this creditor, so far as appears, was recognized without question or contest. (*Id.*)
9. The proceeding he instituted is styled "special," and no costs or rate of counsel fee is provided by law otherwise than on an allowance of such taxable costs or allowances as are prescribed by the Code (*sec. 309*). They can only be awarded to a successful party, and in such case it is the duty of the court to determine which party shall pay the same, and in the absence of any other provisions of law, the rate fixed by the Code in analogous cases should govern.

Held, second, that as to the claim of the special assignee or trustee to the allowance of \$6,000, instead of his legal commissions, it must also be denied. There is no provision or principle of law that permits any increase of the allowance to such trustee beyond the statutory compensation made to executors and administrators.

Held, third, that as to the claim of the general assignee to \$40,000, instead of his legal commissions, the same rule applies, and he should be allowed the same commissions which are by statute allowable to executors and administrators, and his allowances should

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be restricted to those rates. Although the law exacts the most conscientious discharge of his duty, nothing can be allowed beyond such statutory allowance under claim for excess of zeal, or assumption of more onerous duties than might have been exacted.

Held, fourth, that as to the claim of the attorneys and counsel of the assignee to an allowance of \$10,000 for the conduct of the proceedings upon the accounting, in addition to the sum of \$1,000 allowed and paid them as a fee in the course of the administration of the assigned estate, the case is not so intricate as to warrant its payment. (*Id.*)

10. The simple employment of such officers of the law to aid an assignee having \$1,000,000 to administer does not necessarily, or by any just deduction from the magnitude of the sums, entitle them to any increased compensation for their services beyond what might be allowed to a like employment of a clerk or other assistant, or to any such engagement where the fund was small in amount. (*Id.*)

11. The services rendered by attorneys and counsel in such cases are to be remunerated according to a fair and reasonable estimate, as in any other ordinary cases of employment; and the amount can have no just dependence for its estimate of value upon the extent or character of the fund to be administered. (*Id.*)

12. The character and quality of professional skill that the necessity of the case requires to be employed, and its general values, are to be considered by the court in passing upon an allowance asked for. (*Id.*)

13. In cases where the aid of counsel are both proper and necessary, the claim on the part of the trustee to an allowance is not one addressed to the mere discretion or arbitrary will of the court, but

must be predicated upon competent evidence for its action. (*Id.*)

14. In the settlement of the accounts of a trustee, no allowance (beyond probably that for some clerky duty) can be made for the preparation, proper keeping and presentation of his accounts in a clear and explicit manner, and with all necessary proofs to sustain it. Such duty he, in law, engages as a part of his *personal* trust, and he cannot, in respect to it, exact any expense for employing counsel to instruct him in his own legal duty, unless some complications or unusual or unforeseen difficulties have arisen rendering such employment of counsel necessary and proper. (*Id.*)

See BANKRUPTCY.

In re Joseph Mooney, ante, 415.

ASSIGNMENT.

1. Under and by virtue of the legislation of this state, in respect to insurance upon lives for the benefit of married women where the policy was what is known as an endowment policy, the amount insured being payable to the husband at a stated time, or to his wife if he died before such time, the wife acquires a contingent interest in such policy, and in the money to become due and payable thereon, of which, until the enabling act of 1873 (*Laws of 1873, chap. 821*), she could not divest herself by assignment or transfer. (*Fowler agt. Buttery, ante, 471.*)
2. Therefore, a paper to which the wife's signature appears to have been subscribed under date of October 13, 1873, and which purports to assign all her right, title, and interest in the policy to the plaintiff; *held*, to be inoperative as an assignment of her right to receive from the insurance company the sum which, by the terms of its contract, it became liable to pay to

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her upon the death of her husband during the period of the policy, provided she survived him. (*Id.*)

8. Where the wife's signature to an assignment of her interest in a policy of insurance upon the life of her husband was procured from her by the exercise, on the part of her husband, of undue influence and control, amounting to compulsion; *held*, that such assignment gave no valid title thereto to the assignee. (*Id.*)

4. Where the policy of insurance provided that the amount insured should be paid to the husband provided his life continued beyond the term or period for which it was insured, and in case of his death before that time, it was payable to his wife:

Held, that the assignment, executed by the husband concurrently with that of the wife, operated only to transfer the contingent interest which he had in the insurance money and his right to collect it, provided his life continued beyond the term or period for which it was insured. (*Id.*)

5. As between the assignee and the wife, no equity arose or can be invoked in favor of the assignee, except to the extent of premiums subsequently paid by him. (*Id.*)

See MORTGAGE.

Grissler agt. *Powers*, ante, 194.

6. A promise made by one person for a valuable consideration, paid by another to pay the debts of the latter, is in legal effect a promise to pay creditors who are such at the time the promise is made. They acquire thereby additional security for the payment of their debts, which will pass as an incident on assignment of one of the debts secured, but the assignee takes it by a derivative title from the assignor, and no direct contract is created by the assignment

between him and the promisor. (*Barlow* agt. *Myers*, 64 *N. Y.*, 41.)

7. It is immaterial that the debts are upon negotiable instruments not due. In the absence of special words indicating such an intent, the promise is not to the persons holding the instruments at their maturity; and the interest of the assignee in the promise is subject to any equities on the part of the promisor existing against the debt while in the hands of the assignor. (*Id.*)

8. Where, therefore, defendant, in consideration of the transfer to her of the property of the firm of R. & W., promised to pay the debts of the firm, among which were certain promissory notes not due, then held by N. R., who before maturity assigned them to plaintiff, in an action upon the promise, *held*, that defendant could set off a claim held by her against N. R. (*Id.*)

9. It is the duty of an assignee of a non-negotiable chose in action, in order to protect himself against a payment by the debtor to the original creditor, to notify the former of the assignment; and in an action upon the demand where such a payment is established, the burden of proving notice prior to payment is upon the plaintiff. (*Heermans* agt. *Ellsworth*, 64 *N. Y.*, 159.)

10. One F. transferred to plaintiff by deed in trust, among other things a demand against defendant for money loaned. F. subsequently brought suit against plaintiff to set aside the trust, in which action defendant was sworn as a witness. Plaintiff succeeded in the litigation. In an action upon the claim defendant proved payment to F. Plaintiff requested the court to charge that the pendency of said action brought by F. was constructive notice to defendant of the existence of the trust deed.

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The court refused so to charge. *Held*, no error; that whether defendant had notice of the character of the action sufficient to put him upon inquiry was a question of fact for the jury. (*Id.*)

11. One who purchases the interest of a partner in a firm acquires simply a right to an accounting in respect to the partnership effects and to a share of the surplus remaining after payment of the partnership debts, deducting any balance that may be due from the vendor to his copartners upon an accounting. (*Morse* agt. *Gleason*, 64 N. Y., 204.)

12. An assignee of a mortgage takes it not only subject to all the equities existing between the parties to the instrument, but to the equities which third persons could enforce against the assignor. (*Greene* agt. *Warnick*, 64 N. Y., 220.)

13. The only effect of recording the assignment of a mortgage, is to protect the assignee from a subsequent sale of the same mortgage; if the assignment be not recorded, it is void as against a subsequent purchaser of the same mortgage. (*Id.*)

14. B. executed at the same time two mortgages on certain real estate, one to M. G., and one to D., which it was understood were to be equal liens and to be recorded at the same time. M. G.'s mortgage was first recorded, and after D.'s mortgage was recorded, was assigned to E. G., and by him assigned to W., both being *bona fide* purchasers for value, without notice of the circumstances. *Held*, that W. took his assignment, subject to all the equities as between M. G. and D., and could claim no priority of lien because of his mortgage being first recorded; that M. G. was not a subsequent purchaser within the recording act, and even if W. could, by

virtue of his assignment, be regarded as a subsequent purchaser of some interest in the real estate, he could claim no preference under the statute, as D.'s mortgage was recorded before the assignments. (*Id.*)

15. The right of a borrower to recover the excessive interest upon a usurious loan is assignable, and upon execution of an assignment in bankruptcy by the borrower vests in the assignee. (*Wheelock* agt. *Lee*, 64 N. Y., 242.)

ATTACHMENT.

Effect of, on bankruptcy proceedings — liability of one paying over money to sheriff under. (*See Duffield* agt. *Horton*, 10 Hun 140.)

1. The filing of a notice of suit pending, and the levy, by virtue of an attachment upon real estate formerly owned by the defendant but sold and conveyed, to the knowledge of the plaintiff, prior to the filing and levy, does not defeat the title of the purchaser, if regular in all respects, save that his conveyance is not recorded; nor is such title subordinated to the lien of the attachment. (*Laumont* agt. *Cheshire*, 65 N. Y., 30.)

2. Under an execution, issued in an action wherein notice had been filed and attachment issued and levied as aforesaid, the sheriff sold and subsequently conveyed all the estate in the premises of which the judgment debtor was seized and possessed on the day judgment was perfected. In an action of ejectment by one claiming under the sheriff's deed, *held*, that as prior to that day the judgment debtor had conveyed and then had no estate, nothing was conveyed by the sheriff's deed. (*Id.*)

3. An action in justices' court, or in the marine court of the city of New York, cannot be commenced

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- by short attachment against a resident of the county. (*Haviland agt. Wehle*, 65 N. Y., 85.)
4. This process is only proper in the cases specified in section 83 of the act to abolish imprisonment for debt, etc. (*chap. 300, Laws of 1831*), i. e., where the defendant is a non-resident of the county, and where, by the provision of section 80 of said act, no warrant can issue against him. (*Id.*)
 5. In all other cases where an attachment is proper, a long attachment must be used. (*Id.*)
 6. The giving of a bond in the form prescribed by the statute in relation to justice's courts (2 R. S., 230, sec. 29), is necessary to confer jurisdiction upon the marine court of the city of New York to issue an attachment. An instrument without a seal is not sufficient, and an attachment issued thereon is void. (*Tiffany agt. Lord*, 65 N. Y., 310.)
 7. The appearance of the defendant for the purpose of moving to set aside the attachment is not a waiver of the objection, and does not give jurisdiction or deprive the defendant of his right to bring an action for the unlawful taking of his property by virtue of the attachment. (*Id.*)
 8. Where property has been seized by virtue of a void attachment a subsequent levy thereon without a return to and acceptance by the owner or without his consent while in the hands of the officer, by virtue of a valid attachment against him, is not a defense, nor does it go in mitigation of damages in an action for the unlawful taking. (*Id.*)
 9. In an action tried at O. for the unlawful taking and conversion of a canal boat at N. Y., a witness for the plaintiff, who testified that he resided at O., was asked the value of the boat. This was objected to on the ground that the value of the boat at O. was not the measure of damages. The objection was overruled. *Held*, no error; that an answer giving the value at N. Y. would have been pertinent, and it did not appear but that such an answer was given; that, to raise the question, defendant should have asked the witness if he referred to the value at O., and, if he answered in the affirmative, then should have moved to strike out his answer. (*Id.*)
 10. The provisions of section 243 of the Code, in reference to sheriffs' fees on attachment, only apply to attachments in courts of record. Officers executing attachments issued out of justices' courts or the marine court of the city of New York have no authority to make charges in addition to their regular fees; these include compensation for caring for property attached. (*Tiffany agt. St. John*, 65 N. Y., 314.)

ATTORNEY.

1. Where an attorney appeared and defended an action for four defendants, and subsequently assigned his claim therefor against two of them, and this assignee brought an action therefor against them, *held*, that the claim was an indivisible one. That the assignment to the plaintiff did not assign the whole claim to him, and the claim being indivisible did not vest him with any separate part thereof. (*Mulford agt. Hodges*, 10 Hun, 79.)

ATTORNEY'S LIEN FOR COSTS.

1. Where no judgment has been entered in an action, an attorney has no vested right to costs therein. Whatever claim he has for his services is against his client on the

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retainer. (*Sullivan* agt. *O'Keefe*, ante, 426.)

2. Although there are cases holding that a party may not discharge a judgment actually entered, and thus deprive his attorney of his costs in such judgment, yet it seems that parties may settle their controversies without consulting the wishes of their attorneys, or even against their wishes, save where judgment has been entered including costs, or where the attorney has obtained a lien on the subject-matter of the action. (*Id.*)
3. The attorney gets no such lien under his retainer alone. (*Id.*)
4. Where an action was brought for the specific performance of a contract for the sale of real property, after the cause was at issue, but before trial, the parties made a settlement of the subject of the action, notwithstanding which the defendant's attorney insisted upon proceeding with the action unless his costs were paid him. The plaintiff thereupon moved for a dismissal of the action :

Held, that, as in fact there was no longer a controversy between the parties, the action should not be continued at their expense, either for the profit or emolument of others, and that the motion for discontinuance should be granted. (*Id.*)

ATTORNEY'S FEES.

See REFERENCE

Randall agt. *Kingland*, ante, 512.

BANKRUPTCY.

1. The statute of New Jersey entitled "An act to secure to creditors an equal and just division of the estates of debtors, who, convey to assignees for the benefit of creditors," passed April 16, 1846

by its provisions is an insolvent law, and as such is suspended by operation of the United States bankrupt law; and an assignment made thereunder confers no title to the property upon the assignees and is void as against creditors. (*Boese* agt. *Locke*, ante, 148.)

2. To entitle an assignee to an order directing a bankrupt to pay or deliver over money or property, it must affirmatively appear:

1. That the bankrupt has possession of it.

2. That he has refused to deliver it on demand made. (*In re Joseph Mooney and Isaac Mooney*, ante, 414.)

3. If the bankrupt renders an account of the property sought to be reached, it is not sufficient that the account is *unreasonable*; there must be evidence of its untruth (*Per BLATCHFORD, J.*). (*Id.*)

4. On an application to review the decision of the district court upon the question whether the bankrupt has made a full disclosure in obedience to an order, requiring it, the proposition to be made out by the petitioner must be that a reasonable man would not be able to give credit to the relation given by the bankrupt, but would be satisfied of its substantial untruth (*Per JOHNSON, J.*). (*Id.*)

See TRADE-MARK.

Helmhold agt. *Henry T. Helmhold Manufacturing Company*, ante, 453.

See ACCOUNTING.

Matter of Herman, ante, 377.

5. By section 2 of chapter 390, of the act of congress of 1874, providing "that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt * * * shall, when such debt does not exceed \$500, be collected in the courts of the state

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- where such bankrupt resides," the United States district court is vested with exclusive jurisdiction over all actions brought by an assignee to recover property alleged to have been transferred by the bankrupt in violation of section 5128 of the United States Revised Statutes, where the value of such property is greater than \$500. (*Olcott* agt. *Maclean*, 10 *Hun*, 277.)
6. Although prior to the passage of the act of 1874 the state court had concurrent jurisdiction with the United States district court over such actions, yet by the passage thereof such jurisdiction was withdrawn from it, even as to actions theretofore commenced and then pending therein. (*Id.*)
7. One Davenport, having commenced an action against a corporation created in the state of Missouri, procured an attachment to be issued therein, on the 15th of September, 1873, under which a debt due from the plaintiff to the said corporation was attached. On the 3d of November, 1873, Davenport recovered judgment in the said action and issued execution thereon. On the second of October a petition in bankruptcy was filed against the corporation in Missouri, and on the eighth of November it was duly declared bankrupt. Davenport and the assignee in bankruptcy each claiming the money, the plaintiff brought this action, praying that the court would decide which of the two were entitled to receive the same. *Held*, that as the attachment was issued within four months of the filing of the petition, it was annulled by the subsequent adjudication, and that the assignee was entitled to the money. *Held*, further, that this was not an action to recover assets belonging to the estate of the bankrupt within the meaning of the amendment of the bankruptcy act of 1874, depriving the state courts of jurisdiction over such action, but was brought to secure a decision binding on the contesting claimants, declaring to which of them the debt could lawfully be paid, and that this court had jurisdiction over the same. (*Brewers and Masters' Ins. Co. agt. Davenport*, 10 *Hun*, 264.)
8. An assignment to an assignee, duly appointed, in proceedings under the bankrupt act, dissolves the lien of an attachment issued out of a state court, where the property of the bankrupt has been levied upon within four months of the commencement of such proceedings. (*Duffield* agt. *Horton*, 10 *Hun*, 140.)
9. Where, in such a case, the person owing to the bankrupt the money levied upon under the attachment delivers the same to the sheriff upon an execution issued upon a judgment recovered in said action, not knowing that an assignee in bankruptcy had been appointed after the attachment and before the judgment, he is liable to such assignee for the value of the property so delivered. (*Id.*)
10. The bankruptcy act of March 2, 1867, did not take effect so as to suspend the operation of the insolvent law of this state until June 1, 1867. (*Augsbury* agt. *Crossman*, 10 *Hun*, 389.)
11. A petition, for the discharge of a debtor under the state insolvent law, was signed by a judgment creditor, who indorsed thereon: "For value received I hereby release to the assignee to be appointed, all claims on the estate of Charles Crossman, that I have by reason of the judgment against him assigned to me." *Held*, that this was a sufficient compliance with the provision of 2 Revised Statutes, §6, section 11, requiring any secured creditor, who signs the application, to add to his signature a declaration in writing

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relinquishing his security for the benefit of all the creditors of the debtor. (*Id.*)

12. Under section 29 of the original bankrupt act, providing that "at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts," *held*, that the requirement that the application should be made within one year from the adjudication of bankruptcy, applied only to those cases in which no debts were proved, or no assets had come to the hands of the assignee. (*Wood agt. Hazen*, 10 *Hun*, 362.)

13. On the 23d of June, 1873, plaintiff obtained a judgment against one Frink, and on the twenty-sixth issued an execution thereon to the sheriff, by whom a levy was made on personal property sufficient to satisfy the same. Frink having been adjudged a bankrupt in the following August, a marshal, under an order of the bankrupt court, demanded of, and received from the sheriff possession of the said property, and subsequently delivered the same to the defendant, Frink's assignee in bankruptcy. In an action by the plaintiff to recover the value of the property, *held*, (1) that the action could not be maintained as for a wrongful taking and conversion of the property, as the plaintiff acquired by the levy no sufficient title to or interest in the same to sustain such an action; (2) that it could not be maintained as an enforcement of an equitable lien, acquired by the plaintiff by virtue of his judgment, on the fund in the hands of the assignee, for the reason that the bankruptcy court alone had jurisdiction over

an action of such a character. (*Ansonia Brass and Copper Co. agt. Pratt*, 10 *Hun*, 443.)

14. The right of a borrower to recover the excessive interest upon a usurious loan is assignable, and upon execution of an assignment in bankruptcy by the borrower vests in the assignee. (*Wheelock agt. Lee*, 64 *N. Y.*, 242.)

15. An assignee in bankruptcy, however, cannot maintain an action to compel a lender to deliver up collaterals turned out by the bankrupt to secure an usurious loan or to have an obligation given by him therefor declared void without paying or offering to pay the sum loaned. He is not a "borrower" within the meaning of the statute (*chap. 430, Laws of 1873*), authorizing a borrower to file his bill for relief without payment or deposit of the sum loaned; that word designates only the party bound by the original contract to pay the loan. (*Id.*)

BILL OF EXCHANGE.

1. In an action upon a bill of exchange against the drawer thereof, the latter may defeat the action by showing that there was no consideration therefor; except when it has passed into the hands of a *bona fide* holder for value before maturity. (*McCulloch agt. Hoffman*, 10 *Hun*, 133.)
2. Where such defense is interposed, the defendant may show all that occurred at the time of the making of the bill, not to limit its effect or change its character, but to establish the absence of any consideration and the knowledge of the plaintiff of that fact. (*Id.*)

BILL OF PARTICULARS.

1. The object of a bill of particulars is but to fairly apprise the party

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calling for it of the nature of the claim against him, and where the claim is fairly disclosed no further specification is necessary. (*Bangs* agt. *Ocean National Bank*, ante, 51.)

2. The rule, as established by the Code of 1848 as to pleading, only required it to state the facts in ordinary and concise language, without repetition, "and in such manner as to enable a person of common understanding to know what was intended." (*Id.*)
3. It now, by the amendment of 1851, only requires a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition. The spirit and intent of the original enactment has not been changed, and all available rights in this respect is rather the subject of a bill of particulars than of a motion "to make a pleading more definite and certain." (*Id.*)
4. It seems, a motion to strike-out matter in an answer as irrelevant and redundant should be granted where the whole is but matter of evidence, and cannot be regarded as any approach to a matter of pleading. (*Id.*)

BILLS, NOTES, CHECKS.

1. It is competent under the Code for one of two makers of a promissory note, in an action upon the note, to prove by parol that he signed the note as surety, to enable him to interpose as a defense that he was discharged by an extension of time given to the principal with knowledge of the suretyship. (*Hubbard* agt. *Gurney*, 64 N. Y., 457.)
2. Such evidence does not alter or vary the written contract, as the fact proved simply operates, when knowledge of it is brought home to the creditor, to prevent him from changing the contract or

making a different one with the principal debtor without the consent of the surety, or from impairing the rights of the latter by releasing any security or omitting to enforce the contract when requested. (*Id.*)

3. The authorities upon the question as to the competency and effect of such evidence collated and discussed. (*Id.*)
4. After the maturity of a note signed by defendant, as surety, and held by plaintiff, who had knowledge of the suretyship, the principal debtor executed a new note which was indorsed by plaintiff, discounted and the avails paid to him; when the note matured a small payment was made by the principal and a new note given. In an action upon the original note, *held*, that there was an implied agreement to extend the time of payment, which being done without the knowledge or consent of defendant, discharged him from liability: that the fact that the note in suit was not surrendered did not affect the character of the implied contract or its legal effect; and that the receipt of the money obtained upon the new note was a sufficient consideration, on the part of plaintiff, for such contract. (*Id.*)
5. Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defense to a promissory note. (*Earl* agt. *Peck*, 64 N. Y., 596.)
6. Where one who has received the proceeds of the sale of stolen negotiable securities with knowledge, loans the same or a portion thereof and takes a promissory note for the amount of the loan, these facts are no defense to an action upon the note brought by the payee or by one to whom he has transferred it after maturity; and this although it appears in addition

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thereto that the owner of the securities has commenced an action against defendant to compel him to pay the money to him, and has obtained an injunction therein, restraining him from paying it over to any other person. (*Warren agt. Haight*, 65 N. Y., 172.)

7. The owner of the securities cannot intervene by mere notice to prevent the holder of the note from collecting it, or to have a trust declared in his favor, unless he is brought in as a party to the action. (*Id.*)

BOARD OF HEALTH.

1. Where a contractor had failed to perform his contract for the removal of "night soil," and the board of health passed a resolution and acted thereunder, directing its immediate removal:

Held, that the board of health, under the fifth section of chapter 636 of Laws of 1874, was a necessary party to an action by the contractor against the city of New York. (*Bell agt. The Mayor, &c.*, ante, 334.)

BONA FIDE HOLDER FOR VALUE.

1. The defendants, H. and M. made their promissory note to their own order for \$1,571.39, and indorsed the same to the defendant K., who, before its maturity, indorsed and delivered it to plaintiff P. The proof showed that M. received value for the note, as it was given in the firm name to H. for money which M. owed to him. H. transferred the note to K. in consideration of \$1,200 balance due K. on a deposit which K. had previously made on account of H. in Detroit. K., who was owing P. at the time on purchases of coal, gave P. the note, who gave him credit for so much cash, and at its maturity, it being protested for non-payment,

P. charged the amount back to K., who was liable as indorser, and took it up with his own check; K. has paid nothing to P. on account of the note:

Held, that P. was a *bona fide* holder for value and entitled to recover, and that the case was properly disposed of on the trial, by directing the jury to find a verdict for the plaintiff. (*Potts agt. Mayer, ante*, 368.)

BONA FIDE PURCHASER.

See MORTGAGE.

Seamoni agt. Ruck, ante, 317.

1. Where the plaintiff, at the time of his purchase, knew that a former deed had been given and lost; but did not know its contents, and the only consideration given by him on the purchase is a mortgage not yet due, and with no personal covenant on his part, the lost deed having afterwards been found and recorded, *held*, that the deed to the plaintiff was not entitled to priority over the first mentioned deed, for the reason that he was not a *bona fide* purchaser under his deed, the only consideration therefor being a mortgage not yet due. (*Schroeder agt. Gurney*, 10 Hun, 413.)

BOND.

1. The giving of a bond in the form prescribed by the statute in relation to justices' courts (2 R. S., 230, sec. 29), is necessary to confer jurisdiction upon the marine court of the city of New York to issue an attachment. An instrument without a seal is not sufficient, and an attachment issued thereon is void. (*Tiffany agt. Lord*, 65 N. Y., 310.)

BURDEN OF PROOF.

1. It is the duty of an assignee of a non-negotiable chose in action, in

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order to protect himself against a payment by the debtor to the original creditor, to notify the former of the assignment; and in an action upon the demand where such a payment is established, the burden of proving notice prior to payment is upon the plaintiff (*Heerman* agt. *Ellsworth*, 64 N. Y., 159.)

2. A defendant in an action under the Code to determine claims to real property, who claims no interest in the property, in order to save himself from liability must appear and disclaim. When this is done the burden of establishing the fact of his making a claim is upon the plaintiff, and in the absence of evidence showing this a judgment against the disclaiming defendant is error. (*Davis* agt. *Read*, 65 N. Y., 566.)

CAUSE OF ACTION.

1. An assignee for the benefit of creditors of an insolvent copartnership, the representatives of a deceased partner, and the surviving partners may properly be joined as parties defendant, and an action may properly be brought against them by a creditor of the firm, to compel the assignee to account and pay over to plaintiff his share of the proceeds of the partnership property, and (it being alleged in the complaint that the surviving partners are insolvent) to recover of the representatives the balance of plaintiff's claim (*ALLEN* and *EARL*, *JJ.*, *dissenting*). (*Haines* agt. *Hollister*, 64 N. Y., 1.)
2. It is the duty of a town to provide means for the payment of its bonds lawfully issued. In case of failure to perform this duty, the holder of the bonds may maintain an action against the town thereon; and this, although by the act under which they were issued, it is made the duty of the board of

supervisors of the county to impose and levy a tax to pay the bonds. (*Marsh* agt. *Town of Little Valley*, 64 N. Y., 112.)

3. Where one engaged in business enters into a copartnership with another for the purpose of continuing the business, and transfers its assets to the firm in consideration of an agreement of the firm to assume and pay certain specified debts incurred in the business, and to apply the assets first to the payment of said debts, the agreement is to be deemed as made for the benefit of the creditors holding the claims specified, and an action may be maintained by such a creditor against the firm upon such agreement. (*Arnold* agt. *Nichols*, 64 N. Y., 117.)
4. A suit in equity to rescind an agreement for the sale of real estate because of defect in title or want of power in the vendor to sell cannot be maintained, as the party has a perfect defense to any action brought against him to enforce the contract. (*Bruner* agt. *Meigs*, 64 N. Y., 506.)
5. As to whether an action can be maintained by one claiming a prior equitable lien upon personal property against a subsequent mortgagee upon the ground that defendant has so conducted himself in the exercise of his legal right of sale as unnecessarily to reduce the value of plaintiff's lien, *quære*. (*Hale* agt. *Omaha Nat. Bk.*, 64 N. Y., 550.)
6. Such an action cannot be maintained where it appears that defendant did nothing but exercise his legal right to foreclose his mortgage and sell the interest of the mortgagor in the property. (*Id.*)
7. Plaintiff's complaint alleged, in substance, that he had an equitable lien upon certain personal property, which property defendant

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wrongfully sold and converted to its own use, thereby depriving plaintiff of his lien. It appeared that the property was taken and sold by defendant under and by virtue of certain chattel mortgages thereon. It did not appear that the property was sold in parcels or was scattered or dissipated, or that it was sold to a *bona fide* purchaser without notice of plaintiff's lien, or that the property was sold in hostility to plaintiff's rights. It did appear that the property was sold for its full value, but that only the right and interests of the mortgagors and of defendant were sold. *Held*, that the fact that the property was sold for full value was insufficient to establish that the sale was hostile to plaintiff, and was not inconsistent with his right to enforce his lien; and that a cause of action for an injury to plaintiff's lien was not established. (*Id.*)

8. Plaintiff was employed by the L. C. and D. R. R. Co. to find contractors to build its road. He procured defendants to agree to enter into such contract. It was agreed that the company was to pay, as part of the consideration for the work, \$250,000. At the close of the negotiation and when the agreement was being reduced to writing, it was further agreed that the sum to be paid defendants should be increased to \$255,000; that defendants should give to plaintiff, as compensation for his services, their order on the company for \$5,000, payable *pro rata*, as the money became due under the contract. The agreement was carried out, the contract executed and the order given and accepted by the company. The contract was subsequently and before any money became due under it, surrendered by defendants and canceled. In an action to recover the amount of the order, *held*, that it was given for a good consideration, and could not be defeated by default of the defendants, and that

defendants were liable. (*Risley agt. Smith*, 64 N. Y., 576.)

9. Where a married man takes boarders into his house or converts it into a hospital for the sick, and his wife takes charge of his establishment or renders services in the house to boarders or sick persons, in the absence of proof of any special agreement, all her services and earnings belong to her husband, and he can maintain an action to recover therefor. (*Reynolds agt. Robinson*, 64 N. Y., 589.)
10. Where an agreement is made between two parties that compensation for services rendered by one to the other shall be made by a provision in the will of the latter, in case a provision is made sufficient only to compensate in part for the services, the party rendering them has, after the death of the other, a cause of action for the balance against his personal representatives. (*Id.*)

CERTIORARI.

1. Where the proceedings of commissioners of highways, in laying out a highway, are brought up for review upon writ of *certiorari*, this court, in reviewing the determination of the general term of the supreme court thereon, can only take notice of the facts stated in the commissioners' return. The affidavits upon which the writ was granted form no part of the return, and neither the facts therein stated nor the facts appearing in the evidence given before referees on appeal from the decision of the commissioners can be considered in determining whether the commissioners acquired jurisdiction. (*People ex rel. Becker agt. Burton*, 65 N. Y., 452.)
2. Accordingly, *held*, where the order laying out the road, made part of the commissioners' return, stated

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that notice in due form of law was given to H., "the owner and occupant of the lands," through which the highway was to run, of the time when and the place where the commissioners would meet to decide upon the application, and where the return also alleged such service, and that H. attended the meeting, that these statements were conclusive, although in the affidavits and evidence it appeared that J. was the occupant. (*Id.*)

CHATTEL MORTGAGE.

1. As to whether an action can be maintained by one claiming a prior equitable lien upon personal property against a subsequent mortgagee upon the ground that defendant has so conducted himself in the exercise of his legal right of sale as unnecessarily to reduce the value of plaintiff's lien, *quære*. (*Hale* agt. *Omaha Nat. Bk.*, 64 N. Y., 550.)
2. Such an action cannot be maintained where it appears that defendant did nothing but exercise his legal right to foreclose his mortgage and sell the interest of the mortgagor in the property. (*Id.*)
3. Plaintiff's complaint alleged, in substance, that he had an equitable lien upon certain personal property, which property defendant wrongfully sold and converted to its own use, thereby depriving plaintiff of his lien. It appeared that the property was taken and sold by defendant under and by virtue of certain chattel mortgages thereon. It did not appear that the property was sold in parcels or was scattered or dissipated, or that it was sold to a *bona fide* purchaser without notice of plaintiff's lien, or that the property was sold in hostility to plaintiff's rights. It did appear that the property was sold for its full

value, but that only the rights and interests of the mortgagors and of defendant were sold. *Held*, that the fact that the property was sold for full value was insufficient to establish that the sale was hostile to plaintiff, and was not inconsistent with his right to enforce his lien; and that a cause of action for an injury to plaintiff's lien was not established. (*Id.*)

CITY OF NEW YORK.

1. A resolution of the common council of the city of New York, authorizing work to be done, is required to be published in the corporation papers, and the want of publication is fatal to a contract. (*Eno* agt. *The Mayor, &c.*, ante, 382.)
2. The legislature cannot by an *ex post facto* law make a party liable for damages for the failure to perform a contract which at the time of its breach was void. (*Id.*)
3. Where the contractor abandoned his contract in 1871, and the legislation validating the contracts took place subsequent to that time, the rights of the sureties on the bond of the contractor had become fixed and could not be affected thereby. (*Id.*)
4. The municipal authorities of the city of New York are the agents of the property owners, and a bond of a contractor taken for the faithful performance of his contract is taken for their benefit, and in case of the non-fulfillment of the contract the bond should be collected, and the amount thereof applied in diminution of the assessment. (*Id.*)
5. An action may be maintained by a property owner to restrain the corporation of the city of New York from collecting an assessment without crediting him with the proportionate amount of a bond given by a contractor for the

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faithful performance of his contract, and which he failed to perform, the work under which being done by a subsequent contractor at a much higher rate. (*Id.*)

CODE.

1. Section 110—This section was designed to introduce no new principle applicable to reviving stale demands, but solely to prevent the revival of such demands by loose oral declarations. (*Kincaid* agt. *Archibald*, 10 *Hun*, 9.)

Section 113—The committee of the person and estate of a lunatic is not the trustee of an express trust within the meaning of. (*See Burnett* agt. *Bookstaver*, 10 *Hun*, 481.)

2. Section 124—In an action against the sheriff and attaching creditors, praying that they be compelled to determine their conflicting claims to property attached, *held*, upon the application of the sheriff, that he was entitled under section 124 of the Code to have the place of trial changed to his county. (*Wintjen* agt. *Verges*, 10 *Hun*, 576.)

Section 171—When pleadings cannot be amended upon the trial under. (*See Phillips* agt. *Melville*, 17 *Hun*, 211.)

Section 238—The giving by non-residents of the bond of indemnity required by—does not relieve them from giving security for costs as required by part 3, chapter 10, title 2, section 1, of the Revised statutes. (*See Hodges* agt. *Porter*, 10 *Hun* 244.)

3. Section 268—After the entry of an interlocutory judgment or decree, not authorizing a final judgment, but directing further proceedings before a referee or otherwise, a motion for a new trial, on a case and exceptions, may be made under section 268 of the

Code, without taking any appeal from such judgment or decree. (*Bennett* agt. *Austin*, 10 *Hun*, 451.)

4. *Semble*—Such motion cannot be made in case of a trial, before a referee. (*Id.*)

5. Such motion does not stay proceedings under the interlocutory judgment or decree. (*Id.*)

Section 277—Replevin—form of verdict and judgment, in action of. (*See Phillips* agt. *Melville*, 10 *Hun*, 211.)

6. Section 306—Where, in an action brought against several defendants, the plaintiff succeeds as to some and fails as to the others, the successful defendants are only entitled to costs when (1) they are not united in interest with those against whom the plaintiff recovers; (2) they have interposed a separate defense by a separate answer; and when (3) costs are awarded to them by the court. (*Park* agt. *Spaulding*, 10 *Hun*, 128.)

Section 385—Costs—accruing after offer of judgment—when action is tried before the expiration of ten days before the offer. (*See Herman* agt. *Lyons*, 10 *Hun*, 111.)

7. Section 399—The inquiry as to the effects of a deceased person, authorized by chapter 394 of 1870, is subject to the restrictions of section 399 of the Code, prohibiting the admission of evidence given by parties interested in the proceedings as to personal transactions with deceased. (*Tilton* agt. *Ormsby*, 10 *Hun*, 7.)

8. Section 399—Although under this section of the Code, a party to an action may testify as to a conversation between the deceased and a third person which he has overheard, so long as such testimony is limited, to what was neither a personal transaction nor communication between the wit-

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ness and the deceased, yet this rule does not prevail when the third person is an agent for, and is acting in the interest of the witness. (*Head agt. Teeter, 10 Hun, 548.*)

CODE OF CIVIL PROCEDURE.

1. Section 868 — Although, perhaps, as against a corporation defendant a *subpoena duces tecum* would have been unavailing under the Code of Procedure, now, by section 868 of the "Code of Remedial Justice," which provides that "the production upon a trial of a book or paper belonging to or under the control of a corporation, may be compelled in like manner as if it were in the hands or under the control of a natural person," a plaintiff has ample means of obtaining the proofs required of a corporation by *subpoena duces tecum* and the examination as a witness of the party having their custody, either before or after the trial. (*Central Cross-town R. R. Co. agt. Twenty-third Street R. R. Co., ante, 45.*)
2. Section 268 — By the act of 1873, chapter 239, the court of common pleas of the city of New York has jurisdiction over a defendant, served with process in any county of the state, and this includes actions where the cause of action arose in the city of New York, but the defendant did not reside there, as well as actions where the cause of action did not arise and defendant did not reside in the city. (*Gomp agt. Pratt, ante, 511.*)
3. The "Code of Civil Procedure," section 263, subdivision 2, provides in express terms that this court shall have jurisdiction in such cases, and the codifiers state that revision to be, in their opinion, declaratory of the law as it now exists. (*Id.*)
4. Section 190. — By a comparison of this section with section 11 of the former Code, it will be observed that the language of subdivisions 2 and 3 of the present Code preserves the distinction which marks section 11 of the former Code, by which the clause excluding orders involving any discretion is preserved in respect to orders made in the course of the action, but is not contained in subdivision 3, which relates to special proceedings and summary applications after judgment. But the principle which the court of appeals lays down, will be equally applicable under the new statute as under the old, and excludes from review, by appeal to that court, orders involving questions of discretion, when made in special proceedings or after judgment, equally as when made in the course of an action before judgment. (*Martin agt. Windsor Hotel Company, ante, 422.*)
5. Section 526 — An answer containing two paragraphs, the first of which denies *positively* all the allegations contained in the first count of the complaint; and the second alleging that the defendant has no knowledge or information sufficient to form a belief as to the truth of the facts contained in the second count of the complaint, is a sufficient verification under section 526 of the Code of Civil Procedure. (*Bougen agt. Nolan, ante, 485.*)
6. The verification need not be in the exact words of the statute, but a substantial compliance is sufficient. (*Id.*)

COMMON PLEAS (NEW YORK CITY).

1. By the act of 1873, chapter 239, the court of common pleas of the city of New York has jurisdiction over a defendant, served with process in any county of the state,

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and this includes actions where the cause of action arose in the city of New York, but the defendant did not reside there, as well as actions where the cause of action did not arise and defendant did not reside in the city. (*Gemp* agt. *Pratt*, ante, 88.)

2. The "Code of Civil Procedure," section 263, subdivision 2, provides in express terms that this court shall have jurisdiction in such cases, and the codifiers state that revision to be, in their opinion, declaratory of the law as it now exists. (*Id.*)

COMPLAINT.

1. In an action between partners, in order to justify a recovery in favor of the plaintiff for any "specific sum" there should have been a balance struck, or agreed upon, as due from the defendant to the plaintiff. (*Covert* agt. *Henneberger*, ante, 1.)
2. An action for such balance cannot be connected with an action for "an accounting," unless there be in the complaint appropriate allegations. (*Id.*)
3. The court is justified in looking at the prayer for relief in order to ascertain the plaintiff's view of his own cause of action. (*Id.*)
4. Where the complaint alleged that there were "other individuals comprising the firm of J. B. Lippincott & Company" besides the two persons made defendant, *held*, that the other partners are necessary parties, and that to render the omission to make them parties available on demurrer, the defect appearing on the face of the complaint, it was not necessary that it should also appear that the other parties were living. (*Green* agt. *Lippincott*, ante, 83.)
5. The fact that all the relief which may be essential to such an action has not been claimed, does not render the complaint so defective as to make it the subject of a demurrer. To avoid that consequence it is sufficient that the facts constituting an equitable cause of action have been alleged and that the relief insisted upon is appropriate *too*, while it may not be all that will be required for a complete or perfect judgment (*Affirming S. C.*, 52 *How.*, 479). (*Buess* agt. *Koch*, ante, 92.)
6. In an action by an incorporated bank, where the complaint contains no allegation that the plaintiff is a corporation, or entitled to sue as such, the objection is properly taken by answer. (*National Bank of Utica* agt. *Wells*, ante, 242.)
7. A demurrer can only be interposed where it affirmatively appears upon the face of the complaint that the plaintiff has not legal capacity to sue. (*Id.*)
8. One who indorses his name on a non-negotiable promissory note, before its delivery by the maker to the payee, is, in effect, himself a maker of the note; and his name, equally with that of the maker who subscribes it, imports an absolute liability for its payment at maturity. (*Paine* agt. *Noelke*, ante, 273.)
9. Where it appears from the complaint that one of the two defendants made the note in suit in favor, but not to the order, of the plaintiff, the payee therein named, that the other defendant indorsed it, and that it was thereupon delivered to the plaintiff:
Held, that these averments, taken together, must be deemed equivalent to an allegation that the two defendants made the promissory note, and that both are jointly liable as makers thereof. (*Id.*)

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10. Although not negotiable, the instrument is a promissory note, and, as such, imports a consideration, though none is expressed. Want of consideration is matter of defense. (*Id.*)

See REFERENCE.

Rowell agt. *Giles*, ante, 244.

See INJUNCTION.

Mann agt. *Board of Education*, ante, 289.

See NEGLIGENCE.

Stalknecht agt. *Pennsylvania Railroad Company*, ante, 305.

See PARTNERSHIP.

Williams et al. agt. *Gillies et al.*, ante, 429.

See PROMISSORY NOTE.

Pratt agt. *Short*, ante, 506.

COMPLAINT.

1. A complaint alleging that, the plaintiff "sold and delivered to the defendant certain goods of the value, and for which the defendant agreed to pay \$164.68," is sufficient, and it is not necessary to allege that the demand has not been paid, or that it remains due and unpaid at the time of the action. (*Salisbury* agt. *Stinson*, 10 *Hun*, 242.)

Indefinite allegation as to means profits in—must be objected to before trial. (See *Candee* agt. *Burke*, 10 *Hun*, 850.)

In action upon a promissory note—need not allege that there was any consideration therefor. (See *Underhill* agt. *Phillips*, 10 *Hun*, 591.)

CONTEMPT.

1. Where, upon motion to punish a party for contempt in violating an injunction there is legal evidence sufficient to call for the ex-

ercise of the judgment and discretion of the court, its decision is not reviewable here. (*Mayor, &c.*, agt. *N. Y. and S. I. F. Co.*, 64 *N. Y.*, 628.)

2. A party, bound to obey an injunction, may be guilty of a violation thereof as well by aiding, abetting and countenancing others in violating it as by doing it directly; such orders must be honestly and fairly obeyed. (*Id.*)

3. Where proceedings to punish a party for contempt, in violating an injunction, are commenced by an order to show cause, interrogatories need not be filed prior to a final adjudication upon the alleged contempt. (*Id.*)

CONTRACT.

1. The complaint set out an agreement or contract in writing for the delivery of a deed of land and the payment of the consideration on or before May 1, 1875. It was also averred that before that day the party whose duty it was to deliver the deed applied to the party who was to pay the consideration, to name a time and place for performance, to which such party did not reply. It is also alleged that he subsequently executed a deed, in due form, and made all reasonable efforts to find and communicate with the other party to complete the agreement, but which efforts, through the acts and omissions of the other party, were unavailing:

Held, that the complaint, although it failed to show a strict performance of the agreement by the plaintiff, alleged such a state of facts as directly tended to excuse it, and which entitled him to have the agreement specifically performed. (*Buss* agt. *Koch*, ante, 92.)

2. The omission of the plaintiff to have the deed executed on or be

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fore the 1st of May, 1875, and tendered on that day at defendant's residence, was equitably excused by the other acts performed by him. A formal tender was waived by the acts and omissions of the defendant. (*Id.*)

3. The fact that all the relief which may be essential to such an action has not been claimed, does not render the complaint so defective as to make it the subject of a demurrer. To avoid that consequence it is sufficient that the facts constituting an equitable cause of action have been alleged and that the relief insisted upon is appropriate *too*, while it may not be all that will be required for a complete or perfect judgment (*Affirming S. C.*, 52 *How.*, 479). (*Id.*)
4. A contract or agreement is the union of two or more minds in a thing done or to be done. The assent of the parties must be mutual, reciprocal, concurrent. (*Dicta agt. Parish, ante*, 217.)
5. There must be some medium of communication by which the union of minds may be ascertained and manifested. This medium is language, symbolical, oral or written. In oral and symbolical communications, when the parties are together, the assent is mutual and the contract completed when the acceptance of one party is announced to the other. (*Id.*)
6. In written communications, and especially in cases where the law requires the assent to be evidenced by a writing, the writing must be delivered by the party to be bound thereby in such a manner as to deprive him of the right to recall it. The intent is the governing and controlling element in the determination of the question whether a contract has or has not been concluded in a given case. (*Id.*)
7. Although the mere consent of the parties is sufficient for the perfec-

tion of consensual contracts, nevertheless, if, in agreeing upon a sale or any other bargain, they also agree that there shall be some other formal act, with the intent that the bargain shall not be deemed perfect until such act is performed, the parties, though they may have agreed upon the terms, may recede before the act is complete. (*Id.*)

8. In the case of a contract under seal or a deed, the *locus penitentiae*, the opportunity of withdrawing from it before the parties are finally bound, exists up to the time of its actual delivery as a living obligation. (*Id.*)
9. D. and F. being in treaty for the purchase and sale of a house, met at F.'s office for the purpose of continuing the negotiations. D. brought with him a printed form of contract in duplicate, with a description of the premises filled in. D. signed both of the contracts and handed them to F. for signature, who signed both. At this stage of the business it was decided by F. to proceed no further in it until he had advised with his counsel. At the time it was agreed between the parties to make the delivery of the contract and the payment of the first installment required by it dependent upon the approval of F.'s counsel. F. took both duplicates into his possession, and both parties proceeded to the office of F.'s counsel. The latter not being in, both duplicates, together with a check for the amount of the first installment, were left by F. for his counsel, with instructions, in case of approval, to deliver one of the duplicates and the check to D. The contract was never approved, nor were any of the papers handed by said counsel, or with his knowledge or consent, to the plaintiff. Before leaving the office of F.'s counsel, D. succeeded in obtaining one of the papers by removing it from a desk where it

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was lying, and, putting it in his pocket, took it away with him:

Held, that there was no valid delivery. The mere fact that the plaintiff, against the express understanding of the parties, managed to get hold of one of the duplicates, is not sufficient to enable him to maintain an action for specific performance. Under the facts as found, the case is not one for a specific performance.

Held, also, that although the subscribing witness was subsequently induced by plaintiff to acknowledge, before a commissioner, the execution and delivery of the instrument, it cannot avail the plaintiff where it appears from the evidence that he, at the time of making such acknowledgment, had no knowledge that the contract had not been concluded, or that the duplicates had not been duly exchanged, and was not aware that any controversy touching the matter had arisen, but had every reason to believe that a delivery had taken place. (*Id.*)

10. A resolution of the common council of the city of New York authorizing work to be done, is required to be published in the corporation papers, and the want of publication is fatal to a contract. (*Eno agt. The Mayor, &c., ante*, 382.)

11. The legislature cannot by an *ex post facto* law make a party liable for damages for the failure to perform a contract which at the time of its breach was void. (*Id.*)

12. Where the contractor abandoned his contract in 1871, and the legislation validating the contracts took place subsequent to that time, the rights of the sureties on the bond of the contractor had become fixed and could not be affected thereby. (*Id.*)

13. The municipal authorities of the city of New York are the agents of the property owners, and a

bond of a contractor taken for the faithful performance of his contract is taken for their benefit, and in case of the non-fulfillment of the contract the bond should be collected, and the amount thereof applied in diminution of the assessment. (*Id.*)

14. An action may be maintained by a property owner to restrain the corporation of the city of New York from collecting an assessment without crediting him with the proportionate amount of a bond given by a contractor for the faithful performance of his contract, and which he failed to perform, the work under which being done by a subsequent contractor at a much higher rate. (*Id.*)

CONTRACT TO BUILD SEWERS (NEW YORK CITY).

1. In a contract with the city for the building of sewers, it was provided that the contractors should satisfy all liens for work or materials, filed with the commissioner of public works (the contracting department), before or within ten days after the completion of the work, otherwise the city should be entitled to retain or deduct such sum from the contract-price. The only notice of lien filed was left with the finance department, some six months after the work was completed:

Held, that the lien not having been filed in the proper department within the proper time, the city had no right to deduct or retain the amount of the same. (*Randolph agt. Mayor, &c., of N. Y., ante*, 68.)

2. The contractors were required, by the terms of the contract, to complete the work within ninety days after the day the commissioner should designate for commencing it, and in case of default the city was entitled to deduct from the contract-price the sum paid for

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inspectors' wages for each and every day the aggregate time of all the inspectors on the work appointed by the commissioner might exceed the stipulated time for its completion. The contract provided that the contractors should commence the work on such day as the commissioner should designate. No notice or designation of a day for the commencement of the work was ever given to the contractor by the commissioner, but the contractors, after applying to the commissioner for such designation and receiving no orders, began the work at their own risk on June 8, 1871:

Held, that the date for fixing the period of time from which the ninety days were to be computed was the day of the actual commencement of the work. The mere placing of an inspector at some particular point of the street where the work was to be performed, was not the notice intended by the provision of the contract. (*Id.*)

CONVERSION.

1. The question as to when an agent is liable in trover for conversion is sometimes difficult. The reason stated. (*Laverty* agt. *Snelhan*, ante, 152.)
2. If the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, although at a less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. (*Id.*)
3. A mere discretionary power to sell real estate does not create a conversion. (*Sage* agt. *Lockman*, ante, 276.)

4. Upon the death of the *cestui que trust*, the estate descends directly to the persons entitled, and the power of sale, as to such share, ceases. (*Id.*)

CORPORATIONS.

1. An action or bill in equity may be maintained against a corporation, on behalf of a holder of its stock, to compel a transfer to him by the company on its books. (*Crushman* agt. *Thayer Manufacturing Jewelry Company*, ante, 60.)
2. A court of equity, in a proper case, may decree the transfers of shares of stock on the books of the company. (*Id.*)
3. The customary action by a party injured by the refusal of a corporation to make transfer to him, is an action at law for damage in which he is entitled to recover its full market value. (*Id.*)
4. But where the shares of the capital stock of a corporation have no market value upon which an assessment of damages in an action at law could be based, their value depending upon the future operations of the company, the company having it in their power to suspend its operations *in toto* so as to make the stock of no value and thus decrease the law damage to a mere trifle, the capital stock being limited and not easily, if at all, procurable in the market, the transfer of the shares owned by plaintiff being effected in fraud of her rights by her husband and one Beales, the transferee, and made on the books of the company by the officers of the company in bad faith, the original certificates not being produced nor properly accounted for, and the transfer being made to one of the officers of the company:
Held, that the equitable power of the court may be invoked and the company compelled to transfer the

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shares of stock to plaintiffs on their books. (*Id.*)

COSTS.

1. The surrogate of New York has no power, under the act of 1870 (*Laws of 1870, section 9, chapter 359*), to make allowances to parties who do not prevail in cases contested before him. (*Noyes agt. Children's Aid Society, ante, 10.*)
2. He may excuse such parties, if the case be in his judgment a proper one, from the payment of costs personally, but he cannot take the subject-matter of the contest, which he adjudges to belong to the successful party, and distribute it, or any part of it, among his defeated antagonists. (*Id.*)
3. For attending the examination of a party before trial, ten dollars is taxable under subdivision 3 of section 307 of the Code, where such party attends ready to be examined, although the examination is then waived and is never had. (*Stiener agt. Ainsworth, ante, 31.*)
4. On an appeal from a surrogate's court an extra allowance of costs may now be granted under section 309 of the Code of Procedure. Such an appeal is, for all purposes of costs, an action at issue on a question of law, and its determination constitutes a trial within the meaning of the section. (*Dupuy agt. Wurtz, ante, 48.*)
5. A writ of *habeas corpus* is a special proceeding under the act of 1854 (*Laws 1854, p. 593, sec. 3*) where it is made returnable in court, and where it calls into exercise the ordinary machinery of courts of law, such as the appointment of a referee to take the testimony, the examination of witnesses *pro* and *con*, and the subsequent hearing in due form in court on the whole evidence, and the decision of the court thereupon. (*Matter of Barnett, ante, 247.*)
6. Costs are allowable in such proceedings, in the discretion of the court. (*Id.*)
7. The costs allowed embrace, however, only the items for proceedings after petition and before trial, and for trial and disbursements (*Affirming S. C., 52 How., 73.*) (*Id.*)
8. Where the plaintiff had a verdict at the circuit, the defendant appealed, the general term affirmed the judgment, the defendant moved the general term for leave to go to the court of appeals, the defendant paid the costs of the appeal, including forty dollars for argument. Thereafter the general term ordered a reargument, and upon such reargument granted a new trial, with costs to abide the event. On the new trial plaintiff again had a verdict and taxed the costs, including forty dollars for reargument:

Held, that this item of forty dollars for reargument was properly allowed. The reargument was ordered upon defendant's application, and as the reargument resulted in a new trial being ordered in which plaintiff recovered, he is entitled to compensation for such reargument. (*Sweet agt. Chapman, ante, 253.*)

See ASSIGNEE.
Matter of Scott, ante, 441.
9. After an action had been noticed for trial and placed upon the calendar, and just as it was about to be moved for trial, an order was entered discontinuing the action upon payment of costs. *Held*, that the defendant was not entitled to include a trial fee in such costs. (*Sutphen agt. Lash, 10 Hun, 120.*)
10. After issue had been joined in this action, and on the seventh

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of February, an offer to allow judgment to be taken against him was served by the defendant; on the ninth of February, the cause was regularly called in its order on the calendar, an inquest taken therein, and the costs accruing subsequent to the offer taxed in plaintiff's favor. *Held*, that, as ten days had not elapsed from the service of the offer of judgment to the time of trial, the plaintiff was entitled to disregard the offer and to tax the costs thereafter accruing. (*Herman* agt. *Lyons*, 10 *Hun*, 111.)

11. Where a judgment is entered in an action against two defendants, and only one answer, the one who does not defend cannot be charged with the costs incurred by the defense of the other. (*Hawk* agt. *Bishop*, 10 *Hun*, 509.)

12. The statute fee bill, although evidence bearing upon the question as to the value and amount of legal services rendered, does not determine the question as between attorney and client. (*Gallup* agt. *Perus*, 10 *Hun*, 525.)

Readjustment of — when granted — what directions as to readjustment proper. (*See Murdock* agt. *Adams*, 10 *Hun*, 566.)

Power of surrogate to allow — limited to the successful party — 2 Revised Statutes, 223, section 10 — chapter 359 of 1870, section 9. (*See Noyes* agt. *Children's Aid Society*, 10 *Hun*, 289.)

Security for — in action by non resident — giving the bond required by Code, section 288, does not relieve from giving security for costs — Revised Statutes, part 3, chapter 10, title 2, section 1. (*See Hodges* agt. *Porter*, 10 *Hun*, 244.)

When one of several defendants entitled to — when plaintiff succeeds as to some, and fails as to the other defendants. (*See Park* agt. *Spaulding*, 10 *Hun*, 128.)

COUNTER-CLAIM.

1. Where a plaintiff does not reply to an answer setting up counter-claims, it is an admission that they were due and owing by plaintiff, and the defendant may avail himself of such admission. (*Randolph* agt. *Mayor, &c., of New York*, ante, 68.)

2. But the defendant waives this advantage if he goes into proof of the counter-claim, and by such proof shows that it could not properly have been set off against plaintiff's demand. (*Id.*)

3. Where one defendant is sued upon an individual liability, he cannot set up as a counter-claim a claim which he holds jointly with another against the plaintiff. (*Baldwin* agt. *Briggs*, ante, 80.)

4. Where the answer sets up by way of counter-claim certain transactions of plaintiffs with the defendant and his copartner, who is not a party to the action, a demurrer to the answer will be sustained. (*Baldwin* agt. *Berrian*, ante, 81.)

5. To an action brought against an attorney at law for moneys received by him as such, he may set up by way of counter-claim a demand in his favor against the plaintiff for services rendered. (*Gopen* agt. *Crawford*, ante, 278.)

6. To an action for rent the defendant set up, by way of counter-claim, damages arising from the erection of buildings on an adjoining lot, the intention of the adjoining owner to build being, as alleged, fraudulently concealed at the time the relation of landlord and tenant was created. *Held*, on demurrer, that the counter-claim was insufficient. Building is not necessarily injurious to adjoining occupant. (*Brown* agt. *Curran*, ante, 303.)

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See LEASE.

Stern et al. agt. Florence Sewing Machine Company, ante, 478.

In an action by assignee in bankruptcy — reply to — by assignee. (*See Von Sachs agt. Kretz, 10 Hun, 95.*)

For loss in transportation, when not sustainable in action by forwarder for commissions. (*See Stannard agt. Prince, 64 N. Y., 300.*)

7. Where, in consequence of a change of grade in a city street, access to demised premises adjoining the street is rendered inconvenient, and the tenant is thereby discommoded and injured, in the absence of any covenant in the lease, protecting him from such injury, it is no defense to and cannot be set up as a counter-claim in an action to recover rent. (*Gallup agt. A. R. Co., 65 N. Y., 1.*)

COUNTY COURT.

1. The County Court has power, under chapter 695 of 1871, upon application of the party aggrieved, to make an order requiring the board of supervisors to refund to such person the amount collected from him, of any tax illegally or improperly assessed or levied; only in cases in which the assessors had no power to make the assessment, and not in cases in which they had power to act but erred in its exercise. (*People ex rel. Hermance agt. Supervisors, 10 Hun, 545.*)

Allegation as to defendant's residence, where an action is brought in — what sufficient — allegations in pleadings — relate to time of beginning suit. (*See Burns agt. O'Neil, 10 Hun, 494.*)

On nonsuit in — has no power to order exceptions to be first heard at the general term. (*See Boyd agt. Cronkite, 10 Hun, 574.*)

Judge of — when interested, may request judge from another county to hold court. (*See Matter of Ryers, 10 Hun, 93.*)

COUNTY JUDGE.

Chamber order of — appeal from, can only be taken after order has been entered in the county clerk's office. (*See Pool agt. Safford, 10 Hun, 497.*)

CRIMINAL TRIAL.

1. In an indictment for perjury alleged to have been committed on an investigation before the fire marshal, it was alleged that the accused swore there were 60,000 cigars in the building at the time of the fire. The proof was that he swore there were 65,000 cigars. This was one of various items of property as to which the accused was charged with having sworn falsely. On error it was objected that there was a fatal variance between the indictment and the proof. The objection was not taken on the trial. *Held*, that it was not available here, as if made upon the trial, the evidence as to this item could have been excluded or waived, and the jury directed to disregard it, and the conviction could have been sustained upon the proof as to the other items. Also, *held*, that the variance was not material. (*Haris agt. The People, 64 N. Y., 148.*)
2. When an indictment charges that the accused has sworn falsely as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offense. (*Id.*)
3. There were two counts in the indictment, the first charging perjury in the oral testimony given before the fire marshal, and the other perjury in swearing to an

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affidavit before the same officer, containing in substance the same matters as testified to orally. The jury found the prisoner not guilty under the first count and guilty under the second. It was claimed that the verdict was inconsistent. It appeared that a portion of the oral testimony was taken when the fire marshal was not present. *Held*, that the objection was untenable, as the jury may have found that the oral testimony alleged to be false was not taken before the marshal. (*Id.*)

4. Plaintiff in error, with two companions, stopped at the house of C. in the day-time. He asked C.'s daughter, who was alone at home, for a drink of cider, offering to pay for it. She refused to let him have it, and he thereupon opened the cellar door, although forbidden to do so by her, went in and drew some cider. He had procured cider there before, and was partially intoxicated at the time. He was indicted for burglary and larceny. Upon the trial his counsel requested the court to direct an acquittal, which was denied. *Held*, error; that the evidence failed to show that the accused entered with intent to commit a crime; that while there was an evidence of an intent to obtain a drink of cider and thus to deprive C. of his property, there was an absence of the circumstances ordinarily attending the commission of a larceny, and which distinguish it from a trespass, and that all the circumstances were consistent with the view that the transaction was a trespass merely. (*McCourt* agt. *People*, 64 N. Y., 583.)

CROSS-EXAMINATION.

1. Although usually when general reputation is relied upon, it is not competent to give in evidence specific acts, either to sustain or to overthrow such general reputation, yet when testimony as to

general reputation is given by a witness, he may be asked upon his cross-examination, with a view to lessen the effect of his testimony as to general reputation, or to show a bias in favor of the party who has called him, but not for the purpose of establishing the fact to be proved, whether he has not heard reports which tend to contradict the purport and effect of his testimony. (*Carpenter* agt. *Blake*, 10 Hun, 358.)

DAMAGES.

1. To create a liability for damages consequent upon representations alleged to be false, the plaintiff must show, first, that the representation was untrue; second, that the defendant knew it was untrue; third, that the defendant made the representation with intent to deceive; fourth, that the plaintiffs acted in reliance on the defendant's representation, under circumstances in which they had a right to rely thereon; fifth, that they were deceived thereby, and so induced to change their relation to the subject, to their damage. (*Babcock* agt. *Libbey*, ante, 255.)
2. The gist of the action for deceit is the fraudulent intent with which the representation is made; that intent is not established by proof merely of the falsity of the representation; knowledge, when it was made, by the party making it, that it was false, must be shown. (*Id.*)
3. The damages recoverable in a case in which the claimant seeks to recover on an agreement to support and maintain the testator during the term of his natural life, is the amount which the board of the testator and his nursing during his last illness were reasonably worth, less the value of any services rendered by him. (*Shakespeare* agt. *Markham*, 10 Hun, 311.)

Action to recover, for negligent killing — under chapter 450 of 1847, as

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amended by chapter 256 of 1849—jury cannot allow interest upon their verdict—chapter 78, of 1870 does not affect actions brought before, though pending, at the time of its enactment. (*See Cook agt. N. Y. Cen. and Hud. R. R. Co., 10 Hun, 426.*)

On breach of a contract to reside with a person in consideration of board, etc.—sale of furniture made necessary by so doing—loss upon such sale cannot be recovered in action for breach of the contract. (*See Candy agt. Candy, 10 Hun, 88.*)

Measure of, on compromise induced by fraudulent representations—remedy of creditor. (*See White-side agt. Hyman, 10 Hun, 218.*)

4. The measure of damages in action against a common carrier for neglect to deliver goods is the difference in the value of the goods at the time and place they ought to have been delivered and the time of their actual delivery; in fixing the time when delivery should have been made, where there is no charge of negligence in transportation, a reasonable time after arrival should be allowed for delivery. (*Sherman agt. H. R. R. Co., 64 N. Y., 254.*)

5. Where property has been seized by virtue of a void attachment a subsequent levy thereon without a return to and acceptance by the owner or without his consent while in the hands of the officer, by virtue of a valid attachment against him, is not a defense, nor does it go in mitigation of damages in an action for the unlawful taking. (*Tiffany agt. Lord, 65 N. Y., 310.*)

6. In an action tried at O. for the unlawful taking and conversion of a canal boat at N. Y., a witness for the plaintiff, who testified that he resided at O., was asked the value of the boat. This was

objected to on the ground that the value of the boat at O. was not the measure of damages. The objection was overruled. *Held*, no error; that an answer giving the value at N. Y., would have been pertinent, and it did not appear but that such an answer was given; that, to raise the question, defendant should have asked the witness if he referred to the value at O., and, if he answered in the affirmative, then should have moved to strike out his answer. (*Id.*)

DEED OF TRUST.

See PARTIES.

Conklin agt. Davies, ante, 409.

DEFENSES.

1. Any defense or answer which the judgment debtor has to the enforcement of the judgment, except matters which ought to have been pleaded to the original action, or which existed prior to the judgment, is available to him where an order is obtained for his examination in supplementary proceedings. (*Walker agt. Donovan, ante, 3.*)

2. A demurrer to a complaint is the interposition of a defense, and is sufficient within the meaning of section 309 of the Code to entitle a defendant in a proper case to an extra allowance. (*Moulton agt. Beecher, ante, 86.*)

See PARTNERSHIP.

Williams et al. agt. Gillies et al., ante, 429.

See PROMISSORY NOTE.

Pratt agt. Short, ante, 506.

3. Where the substantive ground of an action against an infant is contract, as well as where the contract is stated as an inducement

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to an alleged tort, infancy is a defense. (*Hewitt* agt. *Warren*, 10 *Hun*, 580.)

4. In an action against the maker and payee of a promissory note indorsed in blank, it is no defense thereto to allege that the plaintiff is not the owner and holder of the note or the real party in interest, and that some one else is. (*Hays* agt. *Southgate*, 10 *Hun*, 511.)

5. As to whether the fact that the Indian right of occupation of lands within this State had not been extinguished with the sanction of the State government or abandoned by the Indians, can be set up by one without title, as against the owner in fee subject to such rights, *quære*. (*Howard* agt. *Moot*, 64 *N. Y.*, 262.)

6. Where a party, for a valuable consideration, gives to another an order payable out of a fund not then in existence, such party cannot, by his own default, prevent the creation or realization of the fund and interpose the absence or failure of the fund as a defense to an action upon the order; so where an order is drawn upon a fund, to be paid upon the happening of a certain condition, which order is accepted, the acceptor cannot, by his own act, defeat the condition and then set it up as a defense in an action upon the acceptance. (*Risley* agt. *Smith*, 64 *N. Y.*, 576.)

7. Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defense to a promissory note. (*Bart* agt. *Peck*, 64 *N. Y.*, 596.)

8. Where, in consequence of a change of grade, in a city street, access to demised premises adjoining the street is rendered inconvenient, and the tenant is thereby discommoded and injured, in the absence of any covenant in

the lease, protecting him from such injury, it is no defense to and cannot be set up as a counter-claim in an action to recover rent. (*Gallup* agt. *A. R. Co.*, 65 *N. Y.*, 1.)

9. Where one who has received the proceeds of the sale of stolen negotiable securities with knowledge, loans the same or a portion thereof and takes a promissory note for the amount of the loan, these facts are no defense to an action upon the note brought by the payee or by one to whom he has transferred it after maturity; and this although it appears in addition thereto that the owner of the securities has commenced an action against defendant to compel him to pay the money to him, and has obtained an injunction therein, restraining him from paying it over to any other person. (*Warren* agt. *Haight*, 65 *N. Y.*, 171.)

DEMURRER.

1. Where the complaint alleged that there were "other individuals comprising the firm of J. B. Lippincott & Company" besides the two persons made defendant, *held*, that the other partners are necessary parties, and that to render the omission to make them parties available on demurrer, the defect appearing on the face of the complaint, it was not necessary that it should also appear that the other parties were living. (*Green* agt. *Lippincott*, *ante*, 83.)

2. Where the answer sets up by way of, counter-claim certain transactions of plaintiffs with the defendant and his copartner, who is not a party to the action, a demurrer to the answer will be sustained. (*Baldwin* agt. *Berrigan*, *ante*, 81.)

3. A demurrer to a complaint is the interposition of a defense, and is sufficient within the meaning of section 309 of the Code to entitle a defendant in a proper case to an

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extra allowance. (*Moulton* agt. *Beecher*, ante, 86.)

conversion. (*Sage* agt. *Lockman*, ante, 276.)

4. The fact that all the relief which may be essential to such an action has not been claimed, does not render the complaint so defective as to make it the subject of a demurrer. To avoid that consequence it is sufficient that the facts constituting an equitable cause of action have been alleged and that the relief insisted upon is appropriate too, while it may not be all that will be required for a complete or perfect judgment (*Affirming S. C.*, 53 *How.*, 479). (*Buess* agt. *Koch*, ante, 92.)

2. Upon the death of the *cestui que trust*, the estate descends directly to the persons entitled, and the power of sale, as to such share, ceases. (*Id.*)

DETERMINATION OF CLAIMS.

5. In an action by an incorporated bank, where the complaint contains no allegation that the plaintiff is a corporation, or entitled to sue as such, the objection is properly taken by answer. (*National Bank of Utica* agt. *Wells*, ante, 242.)

1. A defendant in an action under the Code to determine claims to real property, who claims no interest in the property, in order to save himself from liability must appear and disclaim. When this is done the burden of establishing the fact of his making a claim is upon the plaintiff, and in the absence of evidence showing this a judgment against the disclaiming defendant is error. (*Davis* agt. *Read*, 65 *N. Y.*, 566.)

6. A demurrer can only be interposed where it affirmatively appears upon the face of the complaint that the plaintiff has not legal capacity to sue. (*Id.*)

DISCONTINUANCE.

7. When a defendant demurs to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action, and afterwards answers the complaint, the answer is a waiver of the demurrer. (*Musgrave* agt. *Webster*, ante, 367.)

1. After an action had been noticed for trial and placed upon the calendar, and just as it was about to be moved for trial, an order was entered discontinuing the action upon payment of costs. *Held*, that the defendant was not entitled to include a trial fee in such costs. (*Sutphen* agt. *Lash*, 10 *Hun*, 120.)

To complaint for goods sold, and not alleging non-payment, on the ground that it did not state facts sufficient, &c., held frivolous. (*See Salisbury* agt. *Stinson*, 10 *Hun*, 242.)

2. Where an order is entered discontinuing an action on payment of costs, the defendant may, so long as the costs are unpaid, enter judgment therefor and issue execution thereon, or he may disregard the order and proceed with the action as though it had never been entered. (*Id.*)

See NEGLIGENCE.

Stalknecht agt. *Pennsylvania Railroad Co.*, ante, 305.

DESCENT.

1. A mere discretionary power to sell real estate does not create a

3: Where a motion is made to discontinue an action, on the ground that one of the defendants has settled and discharged the plaintiff's claim, the party so applying must furnish such evidence in proof thereof as would be sufficient to sustain a plea of *puis dar-*

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rien continuance, or a supplementary answer setting up such settlement. (*Connors agt. Titus, 10 Hun, 285.*)

DISCOVERY.

1. Averments contained in a petition for an inspection of books and papers of a corporation, merely upon information and belief, failing to disclose the sources of such information, are insufficient to entitle the petitioning party to such inspection. (*Central Cross-town R. R. Co. agt. Twenty-third Street R. R. Co., ante, 45.*)
2. There should be something more than a mere suspicion or conjecture as to the necessity of the inspection asked for. (*Id.*)
3. Under the Code of Procedure and the rules of court heretofore existing, the practice has been to deny similar applications, where the production of the books and papers desired could be secured by a *subpoena duces tecum*, and the examination as a witness of the party having their custody, either before or on the trial. (*Id.*)
4. Although, perhaps, as against a corporation defendant a *subpoena duces tecum* would have been unavailing under the Code of Procedure, now, by section 868 of the "Code of Remedial Justice," which provides that "the production upon a trial of a book or paper belonging to or under the control of a corporation, may be compelled in like manner as if it were in the hands or under the control of a natural person," a plaintiff has ample means of obtaining the proofs required of a corporation by *subpoena duces tecum* and the examination as a witness of the party having their custody, either before or after the trial. (*Id.*)

See EXAMINATION OF A PARTY.
Phoenix agt. Dupy, ante, 158.

DIVORCE.

1. An action by a wife against her husband for a limited divorce on the ground of cruel and inhuman treatment comes within the definition of *injuries to the person*, mentioned in section 179 of the Code, and is one in which an order of arrest can properly be granted under the provisions of that section. (*Jamieson agt. Jamieson, ante, 112.*)
2. In an action for divorce on the ground of adultery, where the referee reported in favor of plaintiff, the defendant duly filing her exceptions to such report, the plaintiff moved, upon the referee's report and the testimony, to confirm such report. The defendant moved, at the same time, upon the exceptions, report and testimony, to vacate such report, and for further relief. The court made an order dismissing the complaint upon the merits:
Held, that the court erred in absolutely dismissing the plaintiff's complaint upon the merits. The order of the special term should have been, that the report be set aside, the order of reference vacated, and a new trial of the issues had, with costs to the defendant, to abide the event. (*Harding agt. Harding, ante, 288.*)
3. In this class of cases, the court at special term does possess the power to order a new trial. This power should be exercised, as near as possible, in conformity with the principles which control on a motion for a new trial on a case or exceptions. (*Id.*)
4. If the exceptions are sustained, and the question is capable of being obviated by proof, no absolute judgment should be directed, but a new trial ordered. (*Id.*)

See ACTION.

Callender agt. Callender, ante, 364.

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EJECTMENT.

1. When, in an action of ejectment, it appears from the complaint that the plaintiff claims to recover the value of the rents and profits of the premises during the time they have been unlawfully withheld by the defendant, it is too late, on the trial, to object to the form and want of particularity and certainty with which the allegations relating thereto are made. (*Candee* agt. *Burke*, 10 Hun, 350.)

Cannot be brought by the committee of the person and estate of a lunatic in his own name—for real property which belong to the lunatic prior to his (the committee's) appointment. (*See Burnett* agt. *Bookstaver*, 10 Hun, 481.)

2. A writ of possession issued upon a judgment in ejectment can lawfully be executed after the return day thereof; the office of the writ is simply to carry into effect the judgment and the command to return within sixty days is directory merely. (*Witbeck* agt. *Van Rensselaer*, 64 N. Y., 27.)
3. Although it is the duty of the sheriff, in executing such writ, if required, to remove from the premises the personal property thereon, the omission to do so does not vitiate the execution of the writ when possession of the land is delivered. (*Id.*)
4. Where the action was brought by a landlord because of non-payment of rent, and possession is delivered to him or his assignee, the statute giving to the defendant six months after such taking possession in which to redeem (2 R. S., 506, sec. 33) begins to run, and the time limited for redemption is not enlarged by a subsequent re-entry of the tenant. (*Id.*)
5. In an action of ejectment wherein the question was as to the location of a boundary line, it appeared that the adjoining owners for more than fifty years had occupied each on his side up to an old fence; that the fence had been kept up and maintained as a division fence for more than twenty years, each owner by agreement keeping up one-half. *Held*, that this was sufficient evidence of a practical location of and an acquiescence in the fence as the boundary line, and of a possession for more than twenty years in pursuance of such location to require the submission of that question to the jury. (*Jones* agt. *Smith*, 64 N. Y., 180.)
6. A plaintiff in ejectment must recover upon the strength of his own title; he can take nothing by reason of any defects in that of the defendant. (*Wallace* agt. *Swinton*, 64 N. Y., 188.)
7. In an action of ejectment plaintiff gave in evidence a judgment roll in a former action of ejectment brought by the grantor of plaintiffs' ancestor against defendant to recover the same lands, wherein it was adjudged that said grantor was entitled to possession—*held*, that said roll was conclusive proof of the right of possession in said grantor; that the statutory right of redemption for six months after execution of writ of possession (2 R. S., 506, sec. 33, 34), did not vary its effect as evidence in subsequent suits between the parties, or their privies, of what was adjudicated; and in the absence of proof, that the right so adjudicated did not still exist, plaintiffs, on proof that they had succeeded to that right, were entitled to a judgment for the recovery of possession. (*Caggar* agt. *Lansing*, 64 N. Y., 417.)
8. The action of ejectment now tests not only the right to the possession but the title under which the right exists, whether in fee, for life, or for years. (*Id.*)

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9. Some of the plaintiffs were infants; their father died intestate. *Held*, that their rights were enforceable by their mother as guardian in socage. (*Id.*)
10. Also, *held*, that plaintiffs being the holders of the legal title, were the proper parties to enforce it; and that the fact that they held it as security for a debt, the equitable title being in another, could not be interposed to defeat a recovery. (*Id.*)
11. One count of the complaint set forth the value of the use and occupation and claimed the same as damages. Upon the trial, evidence was given, without objection and uncontradicted, as to the value of the use and occupation. The court directed the jury to find the amount so proved for plaintiffs, "for withholding the possession of the premises." This was excepted to generally. It was urged upon appeal that testimony of the value of the use and occupation was not competent upon an issue as to the damages for withholding possession. *Held*, that the allegation in the complaint was a sufficient claim for *mesne* profits; and that no exception was taken below sufficient to present the objection. (*Id.*)
12. In the judgment the sum recovered was stated to be as damages for withholding possession. *Held*, that this was not an error reviewable upon exception, but an irregularity to be corrected on motion. (*Id.*)
13. Where, during the pendency of an action of ejectment, brought by a lessor against a lessee, under a condition of the lease giving a right to re-enter in case of non-payment of rent, the lessee sublets to another, who, with full knowledge of the facts, puts in a crop upon the land, which is harvested, but not removed therefrom at the time the lessor is put into possession under and by virtue of the judgment in the ejectment suit, the crop belongs to the lessor (REYNOLDS and EARL, *CC.*, *dissenting*). (*Samson* agt. *Rose*, 65 N. Y., 411.)
14. As by the Revised Statutes (2 R. S., 505, *sec.* 30) the commencement of an action of ejectment for non-payment of rent is made equivalent to a re-entry, the lessor is conclusively presumed to have taken possession at the time of service of the complaint, and the tenant, if he remains, is assumed to hold in some manner consistent with plaintiff's paramount right of possession, and when the latter takes possession at the termination of the action such possession relates back to its commencement (REYNOLDS and EARL, *CC.*, *dissenting*). (*Id.*)
15. Any crops, therefore, put in by the tenant, or a subtenant, having notice, subsequent to the commencement of the action, belong to the plaintiff (REYNOLDS and EARL, *CC.*, *dissenting*). (*Id.*)
16. The complaint, in an action of ejectment brought by a lessor, did not state that it was brought as a matter of re-entry for non-payment of rent, but simply alleged title in plaintiff and wrongful possession and claim by defendant. The latter, in his answer, set up and claimed under the lease, and it was conceded that the lease was a subsisting one at the time of the commencement of the action. In an action of replevin brought by the lessor to recover a quantity of grain raised upon the demised premises, *held* (REYNOLDS and EARL, *CC.*, *dissenting*), that it was to be presumed that the action of ejectment was brought upon the condition of re-entry in the lease, and that the principles above stated as to the rights of the parties to the crops applied. (*Id.*)

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EQUITY.

1. As the contract of life insurance is a peculiar one, and as it is fit and proper that the parties should know their rights under such a contract, where the present rights under such a contract are denied, a proper case is made out for the exercise of the equitable powers of the court. (*Mausbach* agt. *The Metropolitan Life Insurance Co.*, ante, 496.)
2. In ordinary cases courts will not, in advance of any present duty, obligation or default, declare the rights and obligations of suitors. They will do it where peculiar circumstances render it necessary to the preservation of right. (*Id.*)
3. Where the allegations of the complaint are that the plaintiff has tendered the premiums due and that the defendant refused to receive them and canceled the policy:
Held, that the plaintiff has a standing in court and is entitled to the relief asked for. (*Id.*)
4. The evidence as to the alleged false representations made by the assured at the time of the application for the policy, *considered, criticised and held* to be entirely insufficient to justify the court in holding that at the time of the application for the insurance the assured was suffering with the disease as claimed by the defendant. (*Id.*)
5. A court of equity will not restrain, by injunction, a court-martial from trying one, subject to its jurisdiction, where he alleges as the only ground for such injunction, that he has already been tried upon the same charge, and that he apprehends that the second trial will be unfairly conducted. (*Perault* agt. *Rand*, 10 *Hun*, 222.)
6. A suit in equity to rescind an agreement for the sale of real

estate because of defect in title or want of power in the vendor to sell cannot be maintained, as the party has a perfect defense to any action brought against him to enforce the contract. (*Bruner* agt. *Meigs*, 64 *N. Y.*, 506.)

7. If a craft of any kind is adapted for use in any employment for which a canal may lawfully be used, and is actually employed in a business lawful in itself, and does not in the conduct of such business unreasonably or unnecessarily obstruct the navigation of the canal by other vessels, a court of equity will not forbid the use of the craft in such employment; and this, although some obstruction to the free passage of vessels necessarily results from the peculiar employment. (*People* agt. *Horton*, 64 *N. Y.*, 610.)
8. It is not the province of a court of equity to proscribe one branch of a business in which a party is engaged, while permitting every other branch of the same business to be carried on in the same locality and with the same instrumentalities. (*Id.*)
9. Where, under a usurious contract, the lender conveys to the borrower premises at a price greater than their actual value, giving his bond with a mortgage on the premises for the agreed price, an equitable action by a subsequent grantee of the mortgaged premises to set aside the mortgage will not be sustained without requiring him to pay the actual value of the property when the mortgage was executed. He is not a "borrower" within the meaning of the act of 1837 to prevent usury (*Chap. 430, Laws of 1837*). (*Bissell* agt. *Kellogg*, 65 *N. Y.*, 432.)

ESTOPPEL.

1. Where a mortgage of \$20,000 was made to a third party to be

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sold, the plaintiffs purchasing said mortgage from an agent of the mortgagor and mortgagee, and paying for the same \$18,000, and afterwards receiving \$1,000 payment on the same; at the time of the assignment of the mortgage to plaintiffs, the mortgagor executed and delivered the usual mortgagor's certificate, upon the faith of which the plaintiffs took the assignment:

Held, that, the plaintiffs having relied on the assurances of defendant, contained in the certificate, in taking the mortgage the defendant is estopped from setting up usury as a defense. *Held*, also, that although said bond and mortgage, as to the original mortgagee, had no legal inception, yet in the hands of the plaintiffs it is a valid and subsisting lien, to the extent of the consideration advanced upon it. (*Real Estate Trust Company* agt. *Rader et al.*, ante, 231.)

2. The plaintiffs having acquired a valid title to the mortgage, no subsequent usurious agreement to extend the time of payment could impair or avoid the original obligation. (*Id.*)

3. Where a national bank indorsed upon the back of a contract, at the time it was made, that a party had on that day deposited with it \$2,500 "to be held by us as collateral security for the faithful performance of the within contract," *held*, that it was within the power of the bank to enter into contract. That even if the contract were *ultra vires*, yet, as it was not illegal, the bank was estopped from setting up that defense, as it would be a fraud upon the plaintiff to allow it to do so, he having entered into the contract relying thereon. (*Bushnell* agt. *Chautauque County National Bank*, 10 Hun, 378.)

4. Where an applicant for a life policy is misled by the agent of

the insurance company into making an erroneous reference as to his family physician in the answers made by him to the interrogatories put to him on such application, the company is estopped from insisting thereon. (*Higgins* agt. *Phoenix Mutual Life Ins. Co.*, 10 Hun, 459.)

When insurance company estopped by acts of agent. (*See Gates* agt. *Penn. Fire Ins. Co.*, 10 Hun, 489.)

Certificate of mortgagors on sale of mortgage to third parties — when it operates as an estoppel to plea of usury by them. (*See Nichols* agt. *Nusbaum*, 10 Hun, 214.)

When party estopped from denying the legal existence of a corporation. (*See Loaners' Bank* agt. *Jacoby*, 10 Hun, 148.)

Receiver of bank — when estopped from questioning acts of officers of. (*See Rosenback* agt. *Manuf. and Builders' Bank*, 10 Hun, 148.)

5. A municipal corporation is not estopped from asserting the invalidity of its bonds, by any conduct of its officers or agents, or by acts of acquiescence and approval on the part of the inhabitants of the municipality, after knowledge of the facts. (*Weisner* agt. *Village of D.*, 64 N. Y., 91.)

When party estopped from asserting a defect not set up in return to writ of mandamus. (*See People ex rel.* agt. *Green*, 64 N. Y., 499.)

EVICTION.

1. Where a tenant has been evicted by the landlord from a portion of the demised premises of substantial value, he cannot be evicted in summary proceedings for non-payment of rent so long as such eviction continues. (*People ex rel. Murphy* agt. *Gedney*, 10 Hun, 151.)

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EVIDENCE.

1. Defendants sought to prove by plaintiff's attorney that at the time of the service of the papers by which the action was commenced, he, plaintiff's attorney, had told them that if there was no defense interposed there would be no costs against them, the defendants. This evidence was objected to and rejected:

Held, that the evidence offered was immaterial so far as any defense to the action was concerned, and had no relation to any such defense. Under a general denial no such matter as that offered to be proven was admissible, because not set up or suggested by the answer. (*Johnson* agt. *Carley*, ante, 326.)

2. Where another action similar in most respects to this was also pending against the same defendants in favor of another plaintiff, and was referred to the same referee, and it was agreed that the cases should be tried together, and the evidence taken should apply to both cases so far as the same was applicable, and it was so taken without any statement at the time by the counsel for either party, as to which case it was to be considered as taken in or applicable to, on motion by defendants that the entire evidence of three witnesses, and such portions of the evidence of the three defendants and four other witnesses named and all other witnesses as related to certain conversations be stricken out on the ground that the same was inapplicable thereto:

Held, that under the circumstances under which this evidence was taken the referee could not be required to do this. A wholesale motion of this character calling for a critical review of such a mass of evidence without any definite specification of such portions as were objected to ought not be granted. And this is especially so where a considerable portion of

the evidence asked to be stricken out had been taken by the defendant, and all the evidence asked to be stricken out had more or less bearing upon the two questions which were principally litigated on the trial, viz: Whether the goods were fraudulently purchased, and whether the defendants as assignees, or under color of the assignment, assumed any control over them. (*Id.*)

3. The circumstances proved on the trial tended to show that the purchasers at the time of the sale were insolvent, and knowing their condition, had bought the goods knowing that they would be unable to pay for them, and with a preconceived design not to pay for them:

Held, that these circumstances were all evidence of fraudulent intent. The existence of the fraudulent intent in such a case is a matter to be inferred, if at all, from circumstances, and in general does not admit of more direct proof. The question of fraudulent intent is more or less speculative, and is often materially affected by circumstances difficult to represent in their full force by any statement of the evidence to an appellate court. The question is not whether the court would have found upon the evidence as the referee has found, but whether there was evidence before him which legitimately tended to sustain the finding. (*Id.*)

4. The proof showed that the defendants, as assignees, did assume to control the property purporting to be assigned, and did prevent the plaintiff from peaceably taking possession thereof, and their attempts to evade all responsibility for so doing by professing unwillingness to accept the assignment, while keeping the goods under their lock and key and making evasive replies to the demands of the agents and attorneys for the plaintiff were unavailing to shield

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themselves from responsibility as custodians of the property, if not under the assignment, at least under color of it. (*Id.*)

See REFORMATION OF WRITTEN INSTRUMENT.

Heelas agt. *Stevin*, ante, 356.

See USURY.

Wheaton agt. *Voorhis*, ante, 319.

5. Where a creditor is induced to compromise a debt upon the receipt of fifty cents on the dollar by means of the false and fraudulent representations made to him by the debtor that another of his creditors has agreed to accept such compromise, the creditor may, upon discovering the falsity of such representation, maintain an action against the debtor to recover the damages sustained by reason thereof. (*Whiteside* agt. *Hyman*, 10 *Hun*, 218.)
6. As in such an action the damages sustained by the plaintiff depend upon the ability of the debtor to pay more than a moiety of his debts, it is competent to ask the witness for the defense whether the defendant held property or assets sufficient to pay over fifty cents on the dollar of his liabilities. (*Id.*)
7. A judgment on an accounting is receivable as evidence, although recovered after the action in which it is introduced was commenced, when it shows that the defendant had become the owner of the claim against the plaintiff, which he was entitled to set up as a counterclaim in such action. (*Vail* agt. *Tuthill*, 10 *Hun*, 31.)
8. Where money is deposited with any individual, not a banker, trustee or agent, upon an agreement that he shall pay interest thereon, and that the same shall not be withdrawn except by drafts payable thirty days after sight, no presumption of payment arises, nor will the statute of limitations run against the debt until it is shown that drafts drawn against the said person, in pursuance of the agreement, have been presented and dishonored. It rests upon the party claiming the benefit of the statute to show the presentation and dishonor of such drafts. (*Sullivan* agt. *Fosdick*, 10 *Hun*, 173.)
9. Upon the trial of an action in which the question at issue was the number of loads of hay delivered at a particular time, a witness stated that he could not then remember the number, but that he knew it at the time and then told it to the plaintiff. Subsequently plaintiff was called as a witness and was allowed, against defendant's objection and exception, to state that the number was fourteen. *Held*, that the evidence was admissible. (*Shear* agt. *Van Dyke*, 10 *Hun*, 528.)
10. Although, usually when general reputation is relied upon, it is not competent to give in evidence specific acts, either to sustain or to overthrow such general reputation, yet when testimony as to general reputation is given by a witness, he may be asked upon his cross-examination, with a view to lessen the effect of his testimony as to general reputation, or to show a bias in favor of the party who has called him, but not for the purpose of establishing the fact to be proved, whether he has not heard reports which tend to contradict the purport and effect of his testimony. (*Carpenter* agt. *Blake*, 10 *Hun*, 358.)
11. Upon the trial of an action in which a witness has been examined on commission, the party at whose instance it was issued, may, after reading in evidence the direct interrogatories and the answers thereto, read in evidence the cross interrogatories and answers, even though the party by

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- whom they were framed may object to his so doing. (*Marshall agt. Watertown Steam Engine Co., 10 Hun, 463.*)
12. Although, under section 399 of the Code, a party to an action may testify as to a conversation between the deceased and a third person which he has overheard, so long as such testimony is limited to what was neither a personal transaction nor communication between the witness and the deceased, yet this rule does not prevail when the third person is an agent for, and is acting in the interest of the witness. (*Head agt. Teeter, 10 Hun, 548.*)
13. Rules of evidence are at all times subject to modification and control by the legislature, and changes thus made may be made applicable to existing causes of action. (*Howard agt. Moot, 64 N. Y., 262.*)
14. An act declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact is valid. (*Id.*)
15. Accordingly *held*, that the act to perpetuate certain testimony respecting the title to the Pulteney estate (*chap. 19, Laws of 1831*), was constitutional and valid. (*Id.*)
16. Also *held*, that the legislature having thereby made the chancellor the final arbiter to determine what would be good *prima facie* evidence of the facts stated, evidence taken in due form, as prescribed by the act, accompanied by the opinion of the chancellor, properly given and certified, to the effect that it was good *prima facie* evidence of the facts stated was, although the evidence was hearsay, competent and conclusive in the absence of any evidence to controvert it. (*Id.*)
17. This court will take judicial notice of the fact that the tract of land known as the "Pulteney estate" was ceded by the State of New York to the State of Massachusetts by the treaty and deed of cession executed December 16, 1786, and that under the proper authority, State and national, the Indian title to said lands has been extinguished. (*Id.*)
18. A memorandum relating to the terms of a parol contract, made at the time by one of the parties negotiating the contract, and read over to the others, although not itself a valid contract, is competent as evidence to corroborate the oral evidence as to the terms of the contract; the memorandum does not make the oral evidence incompetent. (*Lathrop agt. Bramhall, 64 N. Y., 365.*)
19. In an action against an innkeeper for the loss by fire of goods of a guest in an outbuilding, the defense was that the fire was of incendiary origin. The question as to the origin of the fire was contested. Defendant offered to show that on the night of the fire an attempt was made to fire another building, a short distance from the barn of defendant, by the use of similar means to those which defendant's evidence tended to show were used in firing said barn. This evidence was objected to, and objection sustained. *Held*, error; that the evidence was competent as bearing upon the question of the origin of the fire. (*Faucett agt. Nichols, 64 N. Y., 377.*)
20. Where exemplary or punitive damages are claimed in an action, all the circumstances immediately connected with the transaction, tending to exhibit and explain the motive of defendant as to show upon the one side that he acted maliciously, or, upon the other that he acted in the honest belief that he was justified in what he did, or acted under the impulse of sudden passion or

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alarm caused by plaintiff's conduct, are admissible in evidence. (*Volts* agt. *Blackmar*, 64 N. Y., 440.)

21. It is competent under the Code for one of two makers of a promissory note, in an action upon the note, to prove by parol that he signed the note as surety, to enable him to interpose as a defense that he was discharged by an extension of time given to the principal with knowledge of the suretyship. (*Hubbard* agt. *Gurney*, 64 N. Y., 457.)

22. Such evidence does not alter or vary the written contract, as the fact proved simply operates, when knowledge of it is brought home to the creditor, to prevent him from changing the contract or making a different one with the principal debtor without the consent of the surety, or from impairing the rights of the latter by releasing any security or omitting to enforce the contract when requested. (*Id.*)

23. The authorities upon the question as to the competency and effect of such evidence collated and discussed. (*Id.*)

24. Plaintiff's complaint alleged, in substance, that certain bonds belonging to the estate of S., of whose will he was surviving executor, came into defendant's hands as the personal representative of M., a deceased executor, which they refused to deliver up unless plaintiff would pay an unjust claim for commissions, which was disputed by plaintiff, but which he paid in order to obtain the bonds. Defendant's answer alleged, among other things, that an account containing charges for the commissions claimed was delivered to plaintiff at his request, examined by him and admitted to be correct. This allegation, after plaintiff had given evidence that he had always disputed the claim, defendant's offered to prove

on trial. The offer was rejected. *Held*, error; that the averment in the complaint that the claim was unjust and was disputed was necessary in order to show that the payment was involuntary; and it being put in issue, defendant was entitled to the evidence offered as relevant to that issue. (*Scholey* agt. *Mumford*, 64 N. Y., 531.)

25. In an action to recover for service rendered to a boarder sick with cancer, evidence on the part of plaintiff was received, under objection, that the health of his wife was injured by the stench of the cancer. *Held*, no error; that the evidence was competent, not to lay a foundation for recovery for the loss of health, but to show the nature of the services. (*Reynolds* agt. *Robinson*, 64 N. Y., 589.)

26. Physicians who knew the value of services in nursing cancer cases, and who were acquainted with the case, were permitted to give their opinion as to the value of the services in dressing the cancer and caring for the sick person. *Held*, no error. (*Id.*)

27. A physician, who had testified to his knowledge of cancer cases and of the value of services in caring for them, who also testified to having heard the evidence of other physicians who had treated and who described the cancer, and had heard the testimony of plaintiff's wife read, but who had no personal knowledge of the case, was asked: "What would be the value of the services rendered by her in nursing and dressing the cancer?" This was objected to, and the answer received under exception. *Held*, error; as the question called upon the witness to assume the correctness of, and to draw inferences from, the evidence of other witnesses: that his opinion should have been obtained by stating to him an hypothetical case. (*Id.*)

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28. A party to an action is not prohibited by section 399 of the Code from testifying to a transaction or communication between himself and a deceased agent of the opposite party. (*Hildebrandt agt. Crawford*, 65 N. Y., 107.)
29. He may testify also to a conversation, heard by him, between a principal and agent, both deceased, as against a successor in interest of the principal. (*Id.*)
30. Parol evidence to prove the contents of a lost deed should show that the deed was duly executed as required by law, and should show substantially all the contents. The testimony of a witness who has simply heard the deed read, and who can give but a small portion of its contents, is insufficient. (*Edwards agt. Noyes*, 65 N. Y., 125.)
31. A provision in a policy of fire insurance, that any other insurance thereafter made without the consent of the insurer written upon the policy will render it void, may be waived by mutual consent, which may be proved by oral evidence. (*Pechner agt. P. Ins. Co.*, 65 N. Y., 195.)
32. The rule prohibiting the reception of oral evidence to vary or modify a written contract has no application where the validity or existence of the contract itself is concerned. (*Id.*)
33. *It seems*, that a condition in a written instrument not under seal, requiring an act to be performed or evidenced by a statement in writing, may be waived by parol, and that a parol waiver of a similar condition in a sealed instrument may be upheld in equity on the theory of an equitable estoppel. (*Id.*)
34. In an action upon an undertaking given on appeal, the return by the sheriff of the execution unsatisfied is, in the absence of collusion of fraud, conclusive, and cannot be contradicted by evidence that the appellant had property out of which the execution might have been satisfied. (*Humerton agt. Hay*, 65 N. Y., 380.)
35. In an action brought to set aside a conveyance as fraudulent as against the creditors of the grantor, it appeared that the deed upon which plaintiff's judgment was recovered was for property sold after the delivery of the deed. The grantor was allowed to testify, under objection, that he in fact purchased the property, and other property for which other judgments had been obtained against him as agent for his son, and that he did no business on his own account. *Held*, no error; that the judgments conclusively established that as between him and the plaintiffs the debts were his, and he was liable for them; but that it was competent to show that he in fact acted as agent for his son, and as between him and his son the debts were those of the latter; and that as plaintiff could successfully assail the deed only by showing it was given with a view to continue in business, to create future debts, and to save his property from them, or to defraud his future creditors, it was competent for defendants to show that the grantor did not in fact carry on business on his own account or actually contemplate the creation of future debts. (*Teed agt. Valentine*, 65 N. Y., 471.)
36. In an action of ejectment wherein the plaintiff claimed title under a statutory foreclosure, the affidavit of service of notice upon the mortgagor was to the effect that it was served by mail, addressed to him at S., where, "as deponent is informed and believes, he at the time resided," *held* (*EARL, C., dissenting*), that the affidavit did not furnish presumptive evidence of

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service; that to have that effect the affidavit must be of a person who speaks from personal knowledge. Mere information and belief is insufficient. (*Mowry agt. Sanborn, 65 N. Y., 582.*)

37. As to whether, in such case, to sustain the proceedings, oral evidence may be given showing that the mortgagor did, at the time, reside at the place to which the notice was directed, *quære*. (*Id.*)

38. The declarations of a principal, made subsequent to the act to which they relate, and not as part of the *res gestæ*, are not competent evidence against his surety. (*Hatch agt. Elkins, 65 N. Y., 489.*)

39. Defendant E. executed to plaintiffs a bond and mortgage under a contract by which they agreed to secure to and indemnify plaintiffs from loss upon an account with B. In an action to foreclose the mortgage wherein the only question was as to the balance due upon the accounts, plaintiffs, after proof that two statements of accounts had been delivered to B., offered them and they were received in evidence, under objection and exception. They also were permitted to give in evidence, under objection and exception, a letter written by them to B., after the account was closed, stating the balance due, and an indorsement thereon by B., admitting it to be correct. *Held, error.* (*Id.*)

EXAMINATION.

1. Upon the trial of an action in which a witness has been examined on commission, the party at whose instance it was issued, may, after reading in evidence the direct-interrogatories and the answer thereto, read in evidence the cross-interrogatories and answers, even though the party by whom they were framed may object to his so

doing. (*Marshall agt. Watertown Steam Engine Co., 10 Hun, 468.*)

EXAMINATION OF A PARTY.

1. The examination of an adverse party before trial—provided for by section 391 of the Code—is a substitute for the former remedy by bill of discovery. The court has power to grant an order for such examination only where a bill of discovery would previously have been sustained in equity. (*Phentz agt. Dupy, ante, 158.*)

2. Such examination is not an absolute right without any qualification, but is subject to the rules and principles formerly applied by courts of equity to prevent abuse, oppression or injustice, and cannot be had without an affidavit showing that the discovery sought was of some matter material to the establishment of a cause of action or of a defense, and how it was material, so that the party could know exactly what he was called upon to discover, that he might, as in a bill of discovery, object to it as immaterial or improper, or if willing to do so, admit it; or if he were examined, that the judge might confine the investigation within the limits of the discovery sought. (*Id.*)

3. In the restriction imposed upon the right of discovery before the Code (which applies equally to the examination of a party before trial, provided for by this section), it is well settled that a party could not be compelled to discover any matter which might subject him to a penalty, a forfeiture or a criminal prosecution. (*Id.*)

4. In an action for libel, where the affidavits—on which the order for the defendant's examination before trial were granted—stated that the plaintiff would endeavor upon such examination to disclose that the letters which constitute

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the libel for which the actions are brought were published by the defendant; that they were published in malice; that they were received by the parties to whom they were addressed, and that in consequence the plaintiff was injured:

Held, that the discovery which the plaintiff seeks is to compel the defendant to disclose whether he has published a libel, or, in other words, whether he has been guilty of a criminal offense for which he could be indicted and punished, and is within the restrictions imposed, therefore the plaintiff has no right to the discovery sought. (*Id.*)

EXCESSIVE DAMAGES.

1. In actions for *personal injuries* the court will not grant a new trial on the ground of *excessive damages*, unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from passion, prejudice, partiality or corruption. (*Gale* agt. *New York Central and Hudson River Railroad Co.*, ante, 385.)
2. It is not enough to say that, in the opinion of the court, the damages are too high, and that it would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for *personal torts or injuries*. (*Id.*)
3. Although there are cases in which the court has sometimes *reduced verdicts* where the damages were excessive, it would seem to be a doubtful practice in actions for personal injuries. A jury, and a jury only, under the laws of our state, unless otherwise agreed upon by the parties, is the body to whom the duty of assessing damages in actions of this character is confided, and the law which ena-

bles a judge to fix and limit a recovery *after verdict* would seem to apply equally as well to a case *before verdict*. (*Id.*)

4. The better practice would seem to be, where the verdict is so excessive as to justify the conclusion that it is the result of partiality, prejudice or corruption, to set it aside and order a new trial, and thus allow a new jury to assess the damages. (*Id.*)

EXECUTION.

1. No execution against the body of any party shall issue while there is an execution against his property not returned. The official return of an execution against property, unsatisfied in whole or in part, is a condition precedent to final process against the person. (*New York Guaranty and Indemnity Co.* agt. *Gleason et al.*, ante, 122.)
2. Where it appears that the applicants were arrested on June 5, 1875, that judgment against them and their co-defendants was entered January 8, 1876, and execution against property was thereupon issued, which is still outstanding; that plaintiff has endeavored to procure the return of such execution by a rule against the late sheriff to whom it was issued, but that the motion was denied on the ground that a warrant of attachment was issued in the action on the 1st of November, 1873, and levied on property that appeared to belong to defendants or some of them; that, prior to the receipt of such warrant by the sheriff, he had levied upon the same property under and by virtue of other warrants of attachment issued against the said defendants or some of them, in actions which are still pending and at issue, but which have not yet been brought to trial; and that until the validity and effect of such

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prior attachments have been ascertained and determined by the rendition of judgments in such other actions, it cannot be known whether the proceeds of the property attached, or any part thereof, will be applicable to the execution herein:

Held, that such a state of facts is "good cause shown" within the meaning of the statute, why the defendants should not be discharged from custody on account of the plaintiff's neglect to charge him in execution within three months after the entry of judgment. (*Id.*)

3. The mere omission to issue execution against the person within the time limited does not constitute the condition upon which the exercise of the power to discharge an imprisoned debtor from custody depends. To warrant the invocation of such power, or its interposition, there must have been a *negligent* omission to issue such execution. There can be no possibility of *neglecting* to do that which cannot be done. (*Id.*)

Action against sheriff for failure to return — return of, *nulla bona* after commencement of action — effect of. (*See Beckstein agt. Sammis*, 10 *Hun*, 585.)

4. An execution against real property, issued after the death of the judgment debtor, is absolutely void as against those having in their hand any portion of the real estate of the deceased affected by the judgment who have not been made parties to proceedings authorized by the law to revive the judgment against said estate. (*Wallace agt. Swinton*, 64 *N. Y.*, 188.)

5. It is essential to the validity of such an execution that its issuing be authorized by judgment in proceedings, under section 376 of the Code for the enforcement of the judgment. (*Id.*)

6. It is not optional with the judgment creditor to proceed under that section or under section 284; the latter is only applicable where there has been a delay for five years in issuing execution, and the judgment debtor is still living. (*Id.*)

7. Said section 376 is not repealed or affected by the act of 1850 (*chap. 295, Laws of 1850*) making the leave of the surrogate necessary to the issuing of an execution after death of the judgment debtor; this is simply an additional requirement. (*Id.*)

8. As to whether heirs, devisees or terre-tenants can avail themselves of irregularities in proceedings before the surrogate to defeat a title to real property acquired under a sale by virtue of an execution authorized to be issued by the surrogate, *quere*. (*Id.*)

9. The estate and interest of a corporation in real property, although it may be but an easement, is subject to levy and sale on execution, as property distinguished from the franchise of the corporation. (*Ev. Orphan Home agt. Buff. H. Assn.*, 64 *N. Y.*, 562.)

10. A tender to a sheriff by the judgment debtor of the full amount collectible upon an execution in the hands of the former discharges the lien of the execution upon property levied by virtue thereof; and in case of a refusal to accept the tender, and a subsequent sale of the property under the execution, an action for conversion will lie. (*Tiffany agt. St. John* 65 *N. Y.*, 314.)

11. In such an action it appeared that the judgment upon which the execution was issued was rendered by the Marine Court of New York city, for sixty-seven dollars and forty-four cents. As the sheriff was proceeding to sell property levied upon, plaintiff (the judgment debtor) tendered

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§130. The sheriff refused to accept, claiming the tender to be insufficient. Plaintiff thereupon forbade the sale, but the sheriff proceeded with it. Defendant (the judgment creditor) was present and within hearing distance at the time of the conversation, and subsequently was heard to converse respecting the tender he bid upon the property. *Held*, that the tender was *prima facie* sufficient in amount; that if defendant was aware of the facts he was liable for the conversion; and that the evidence was sufficient to authorize the submission of that question to the jury. (*Id.*)

EXECUTORS OR ADMINISTRATORS

1. The personal representatives of a deceased judgment creditor, in whose lifetime an execution was issued upon the judgment and returned unsatisfied, may, upon showing that fact, and giving proof that letters testamentary or of administration had been issued to them, have an order for the examination of the defendant in proceedings supplementary. (*Walker* *agt. Donovan, ante*, 3.)
2. It is not necessary in such a case, before the personal representative can proceed to enforce the judgment that the action should be revived and continued in their name. (*Id.*)
3. By the amendment of section 283 of the Code in 1866, it was provided that in case of the death of the person in whose favor the judgment was given, his personal representatives duly appointed might, at any time within five years after the entry of the judgment, enforce it by execution. Since this amendment, it is no longer necessary to bring an action on the judgment in the nature of a *scire facias* to have the executor or administrator made a party to the judgment to enable him to institute summary proceedings to reach the equitable assets of the debtor. (*Id.*)
4. The affidavit upon which the order for the examination of the defendant is asked must set forth the judgment; that the party who applies for the order is the sole executor or administrator of the judgment creditor; that an execution was issued, and the date of it; that it was returned unsatisfied; that the judgment creditor is dead, and that letters testamentary or of administration were duly issued to him, and that he duly qualified and has ever since acted as his executor or administrator. (*Id.*)
5. Where a person advances money to one of two executors and receives as security therefor scrip of bank stock belonging to the estate, he having at the time reason to know and believe that the money was not borrowed for the benefit of the estate but for the private use of such executor:
Held, that the lender of the money cannot hold the stock as security for the advances, nor compel a transfer to him of the stock on the books of the bank. (*Le Baron* *agt. Long Island Bank, ante*, 286.)
6. Where any executor neglects to take upon himself the execution of a will, any power of sale contained in the will may be executed by the executor or executors who shall take upon themselves the execution of such will. (*Shiffer* *agt. Dietz, ante*, 372.)
7. The surrogate has power, under § Revised Statutes (6th ed., page 839, sec. 4), to punish an executor or executrix for non-compliance with a decree of such court, made on an accounting, directing certain moneys to be paid to a party named in the decree, by a fine or imprisonment, or both, where such misconduct was calculated to, or

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did, defeat the rights of a party in a matter pending in such court. (*Matter of Hahlin, ante, 501.*)

8. In case of inability to perform the requirements imposed by such decree, the court ordering such imprisonment may relieve the person so imprisoned in such manner and upon such terms as it shall deem just and proper. (*Id.*)

9. Though the scheme of the statute seems to contemplate the commitment first and the relief to be sought thereafter, in this case testimony was taken as to the ability of the executrix to perform the requirements imposed by the decree, to the end that the relief might be afforded without the formal imprisonment, if a proper case should have been made. The evidence established beyond doubt that the executrix was substantially without the means of performing the decree, and that her imprisonment could not aid the beneficiary:

Held, that the executrix, being widow of the deceased, and as dowress having an interest in the premises, that interest should be devoted to reimbursing the claimant; and that she should be committed to prison until she should pay the sum required to be paid by said decree, and costs, unless she should execute a release of so much of her interest in the premises, and to the rents thereof, as should be necessary to cover such sums. (*Id.*)

10. By Laws of 1867 (*chap. 782, sec. 5*), a discretion is conferred upon the surrogate to refuse the application for letters testamentary or letters of administration of any person unable to read and write. Henceforth such applications will be refused unless specially ordered by the surrogate. (*Id.*)
11. By the statute (*Laws of 1877, chap. 208*), any person acting as executor or administrator, who

converts to his own use, or fraudulently withholds any money, goods, property, rights in action, &c., belonging to an estate, is guilty of embezzlement, and punishable by *fine and imprisonment*. (*Id.*)

EXTRA ALLOWANCE.

1. On an appeal from a surrogate's court an extra allowance of costs may now be granted under section 309 of the Code of Procedure. Such an appeal is, for all purposes of costs, an action at issue on a question of law, and its determination constitutes a trial within the meaning of the section. (*Dupuy agt. Wurtz, ante, 48.*)

2. A demurrer to a complaint is the interposition of a defense, and is sufficient within the meaning of section 309 of the Code to entitle a defendant in a proper case to an extra allowance. (*Moulton agt. Beecher, ante, 86.*)

3. The motion for an extra allowance in this case was pending when the bill of costs was served, and defendant's attorney insisted that the costs, if to be paid, would be received only on condition that the pending motion for an extra allowance should not be prejudiced. Plaintiff's attorney thereupon tendered the same unconditionally, and left the amount on the table in the office of defendant's attorney:

Held, that there had not been such a final adjustment of costs as to preclude the motion for an extra allowance (*Affirming S. C. at Special Term, 52 How., 230.*) (*Id.*)

FALSE REPRESENTATIONS.

1. Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, acquired by advertising their wares under representations which are false. (*Seabury agt. Grosvonor, ante, 192.*)

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2. To create a liability for damages consequent upon representations alleged to be false, the plaintiff must show, first, that the representation was untrue; second, that the defendant knew it was untrue; third, that the defendant made the representation with intent to deceive; fourth, that the plaintiffs acted in reliance on the defendant's representation, under circumstances in which they had a right to rely thereon; fifth, that they were deceived thereby, and so induced to change their relation to the subject, to their damage. (*Babcock agt. Libbey, ante, 255.*)
3. The gist of the action for deceit is the fraudulent intent with which the representation is made; that intent is not established by proof merely of the falsity of the representation; knowledge, when it was made, by the party making it, that it was false, must be shown. (*Id.*)
4. The plaintiffs having been applied to, to sell their wool to the steam woolen company, wrote to A. T. Stewart as follows: "The Utica Steam Woolen Company offer to buy of us quite a quantity of wool at four months. Now we understand you are selling their goods, and have a lien, &c., on their mills. If we sell them the amount of wool over 100 M., we shall be obliged to sell some of the paper, perhaps all. Will you buy it? If so, what will you give for it? If you do not feel like taking hold of it, please give us your views as to their ability to pay, and very much oblige." To which, by direction of defendant Libbey, without any knowledge of Mr. Stewart, the following answer was written, upon which the present action was founded: "Your favor of sixth inst., to our Mr. Stewart, is before us. The Utica S. W. Co. consign to us all their goods, for which we have a ready sale. Sometimes sold largely ahead of their product on order. We can only form an opinion of their

management from the period they have been in connection with us. As far as we can judge, they have made money. They say they have done better than at any former period. We have taken considerable orders ahead for their spring production, and anticipate a good season for their fabrics. They have nothing to conceal in regard to their position, and we do not doubt will fairly answer all your inquiries. We never buy paper, either manufacturers' or traders'."

Held, first. That it was true the steam woolen company had so consigned their goods to A. T. Stewart & Co., since August, 1867, and the goods manufactured by the steam woolen company, were sold in advance of their production.

Second. To allow the jury to find that the following statement in defendant's letter, *i. e.*, "As far as we can judge, they have made money; they say they have done better than at any former period," was willfully and fraudulently false, from the ordinary cautions of the commission merchant to his consignor, not to draw drafts in advance of the agreed percentage, or the increase of the firm debt, would be manifestly unsafe. In the absence of preponderating proof in favor of that of guilt, the jury should not be allowed to guess. The presumption of innocence cannot be overcome by showing facts consistent with guilt, but by those which are inconsistent with and negative the former.

Third. Although A. T. Stewart & Co. held, at the time of writing the letter, not only a mortgage upon the real estate and machinery of the steam woolen company, but also a chattel mortgage upon the personal property, of which defendant failed to speak:

Held, that the words in plaintiffs' letter, "Now, we understand you are selling their goods, and have a lien, &c., upon their mills," would lead the party to whom such communication was addressed, to

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- suppose that the lien was known to plaintiffs, and that the object of the writer was to ascertain whether A. T. Stewart & Co. would buy the company's paper and, if not, what were their views as to the ability of the company to pay. No jury would be warranted in finding that the defendant, with intent to deceive, suppressed information as to the liens. (*Id.*)
5. The plaintiffs having been informed as to the lien, and one of them having been in Utica, where the clerk's office of Oneida county is located, before a pound of wool had been delivered, had no right to be deceived. If he made no inquiries, it was such gross carelessness, that it cannot be excused. (*Id.*)
6. The Utica Steam Woolen Company, by its articles of association, ceased to exist February 27, 1866. When the mortgages were made to A. T. Stewart & Co., there was no corporate existence, and no valid liens were thereby created. From the fact that both plaintiffs and defendant dealt with the woolen company, as though its corporate existence had not ended, it is assumed that all were ignorant of its dissolution:
Held, that this action, which rests upon an alleged suppression of the truth as to the existence of supposed liens by mortgage, cannot be maintained when no valid incumbrances in fact existed, and when, consequently, no existing actual fact was suppressed. (*Id.*)
7. If the defendant intended to deceive the plaintiffs as to the solvency of the woolen company, supposing it to have been a corporation, which it was not, representing it as solvent, believing otherwise, if it was solvent in fact, by reason of the pecuniary responsibility of those who carried it on, the plaintiffs have sustained no damage by such representation. (*Id.*)
8. If the defendant was guilty of subsequent conduct, which induced the plaintiffs to act upon the belief that they had parted with their goods to a corporation, when it had not, and thus lost their remedies, such subsequent conduct, and not the original representation, must be counted upon, and set forth in the pleadings as the ground of recovery. (*Id.*)
9. No rule of law will justify a recovery upon a true representation, because the party making it supposed it to be otherwise. (*Id.*)
10. If the recommendation is of A, and the sale is made to B, no action can be predicated upon it, unless the party recommending, induces the other to believe B is A. When that does not occur, no action will lie. (*Id.*)
11. This action was brought to recover damages for false and fraudulent representations made by the defendant upon the sale of a horse. The complaint alleged that the false and fraudulent representations were made in a warranty contained in the contract of sale, with intent to deceive and defraud the plaintiff. The defense was infancy. *Held*, that as the plaintiff had not disaffirmed the contract, or returned or offered to return the horse, that he was not entitled to recover. (*Hewitt agt. Warren*, 10 Hun, 560.)
12. The proper remedy in such a case would be to return or to offer to return the horse, and thus put the infant in the position of a mere wrong-doer, unjustly keeping what he had fraudulently obtained. (*Id.*)
13. Where the substantive ground of the action is contract, as well as where the contract is stated as

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inducement to an alleged tort, infancy is a defense. (*Id.*)

FINDINGS OF LAW AND FACT.

1. *It seems*, that if, in an action for negligence, tried by a referee, an express finding of fact that defendant was guilty of negligence is necessary to uphold a judgment, a finding to that effect, although included in the conclusions of law, is sufficient. (*Sherman* agt. *H. R. R. Co.*, 64 *N. Y.*, 254.)

• FORECLOSURE.

1. The plaintiff conveyed to defendant a tract of land four hundred and ten feet by one hundred and nine feet ten inches, which had always been used as one residence, and took back a purchase-money mortgage thereon. Subsequently the defendant, without the assent of the plaintiff, made a map of the land, and laid out an avenue sixty feet wide through the middle thereof and two lanes upon the ends, which were opened, but never dedicated to the public. Upon a sale under a foreclosure of the mortgage, the defendant insisted that the land should be sold according to the lots laid down on the map. *Held*, that the sheriff was right in refusing so to do, and in selling the land in one tract. (*Lane* agt. *Conger*, 10 *Hun*, 1.)
2. Where, in an action brought to foreclose a mortgage, a subsequent incumbrancer, who is made a party defendant thereto, applies, in his own behalf for, and secures the appointment of a receiver of the rents and profits of the mortgaged premises, he is entitled to retain the amount collected by the receiver as against the claim of a prior mortgagee whose debt the amount realized upon the sale of the mortgaged property, under the judgment entered in the action, has been insufficient to satisfy. (*Washington Life Ins. Co.* agt. *Fleischauer* 10 *Hun*, 117.)
3. In an action brought to foreclose a mortgage, the mortgagor and executor of a person to whom a portion of the mortgaged premises had been conveyed, he having agreed to pay a portion of the mortgage, were made parties defendant, the executor being notified that no personal judgment would be taken against him. A deficiency having arisen upon the sale, a judgment for deficiency was entered against the mortgagor. Subsequently, this action was brought against the executor to recover a judgment for the same deficiency against him. *Held*, that the plaintiff could not maintain the action, without first obtaining permission of the court so to do. (*Scofield* agt. *Doscher*, 10 *Hun*, 582.)
4. One asserting a right under a mortgagor prior to the mortgage, is a proper party to an action for foreclosure of the mortgage and the question of priority is proper to be determined in the action. (*Brown* agt. *Volkering*, 64 *N. Y.*, 76.)
5. Where the owner of a mortgage has pledged the same as collateral security for a debt less than the face of the mortgage, he has an interest in the same which entitles him to bring an action for the foreclosure of the mortgage. In such action the pledgee is a necessary party, but it is immaterial as far as the mortgagor or other parties in interest are concerned whether he is made a plaintiff or defendant. (*Simson* agt. *Satterlee*, 64 *N. Y.*, 657.)
6. A judgment in an action for partition of lands held by partners as tenants in common, which directs a partition by commissioners, and charges a mortgage held by one of the partners covering the un-

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divided interest of his copartner upon the separate share of the latter, is not, where no division has already been made, a bar to an action for the foreclosure of the mortgage. (*Reid* agt. *Gardner*, 65 N. Y., 578.)

7. To give proceedings for the foreclosure of a mortgage by advertisement under the statute (2 R. S., 545, *et seq.*) any validity, service of notice of foreclosure and sale upon the mortgagor, in the manner prescribed by the statute (*sec.* 3), is absolutely necessary; and to give the affidavit of service required by the statute (*sec.* 10), or its record or a certified copy thereof, the effect of presumptive evidence (*sec.* 12), it must show such service. (*Mowry* agt. *Sanborn*, 65 N. Y., 581.)
8. In an action of ejectment wherein the plaintiff claimed title under a statutory foreclosure the affidavit of service of notice upon the mortgagor was to the effect that it was served by mail, addressed to him at S., where, "as deponent is informed and believes," he at the time resided, *held* (*EARL, C., dissenting*), that the affidavit did not furnish presumptive evidence of service; that to have that effect the affidavit must be of a person who speaks from personal knowledge. Mere information and belief is insufficient. (*Id.*)
9. As to whether, in such case, to sustain the proceedings, oral evidence may be given showing that the mortgagor did, at the time, reside at the place to which the notice was directed, *quære*. (*Id.*)

FOREIGN JUDGMENT.

1. Action brought upon a Louisiana judgment obtained in 1869 upon an attachment of defendant's real property, the "citation," *i. e.*, summons, having been served at the defendant's domicile in de-

fendant's absence. The answer here set up: First. A general denial of the judgment (on information and belief). Second. Lack of personal service of process on defendant. Third. That defendant never appeared in person or by attorney in the Louisiana action, nor litigated nor defended the same either in person or by attorney, nor did he have any knowledge of the Louisiana suit until long after the judgment. Fourth. *Nihil debet*. *Held*, that the answer, as a plea in bar, is fatally defective. In order to make the answer sufficient, there should have been added to it allegations showing that the defendant was not domiciled in Louisiana or subject to the laws of that state, or that the judgment is not binding there, or that it is contrary to natural justice. (*Cassidy* agt. *Leitch*, *ante*, 105.)

2. A foreign judgment rendered against a citizen of the state in which it is pronounced, stands on a very different footing from a foreign judgment against one who owed no allegiance to, and was not subject to the jurisdiction of the state in which it was rendered. (*Id.*)

FRAUD.

1. Where defendant, in the fall of 1873, began business as a tobacco merchant with a cash or available capital of less than \$2,000, purchased from plaintiffs in November, 1875, and January, 1876, tobacco to the amount of nearly \$4,000, and at the same time, or shortly after, purchased of various other parties large amounts of tobacco, and on February 7th, 1876, made an assignment returning his entire property, at a valuation of \$1,400, without any pretense of any loss by bad debts or otherwise since the date of his purchase from plaintiffs: *Held*, that this purchase from

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plaintiffs without any pretended disclosure of the condition of his affairs, or any reasonable ground for expectation of meeting his obligations, was fraudulent. (*Wells* agt. *Selling*, ante, 85.)

2. Where, during the month of January previous to his assignment, the defendant obtained credits of various parties besides the plaintiffs to the amount of \$7,500 and fails to make any explanation as to its disposition or to show how it, together with what he previously possessed, culminated in the meagre show of assets, at the time of his assignment, amounting to less than \$1,500 as estimated by himself:

Held, that he is thus shown, in the absence of any explanation, to have fraudulently disposed of his property with intent to defraud his creditors. (*Id.*)

3. Where the defendant disposed of \$2,800 to his uncle in the latter part of January, 1876, under an assumed indebtedness to him in that amount, the uncle depositing the same sum in bank to a newly-opened account on the third of February, the defendant reappearing on the first of March in full possession of the same business he had previously carried on under a general power of attorney from his wife, and with capital evidently afforded her by the uncle from the \$2,800 that had gone through the formal process of the payment of the debt to the latter:

Held, that this transaction of the assumed payment to the uncle of \$2,800 was a fraudulent disposition of so much of the defendant's property with intent to defraud his creditors. (*Id.*)

FRAUDULENT CONVEYANCE.

1. On the 14th of August, 1873, the plaintiff, who was a widow, and one Jephtha W. Babcock, a widow-

er, contracted a mutual agreement to marry. At this time each owned and possessed real and personal estates of about equal amounts and value. Both had children of former marriages, of adult age. On the eighteenth of August Jephtha W. conveyed by deed certain real estate to his son and daughter. The said deeds were voluntary on the part of the grantor, no consideration having been paid or agreed to be paid therefor by the grantees. On the twenty-first day of the same August the plaintiff and Jephtha W. did intermarry, in pursuance of their agreement so to do. The plaintiff at the time of the marriage had no information that her husband had conveyed all his real estate to his children. After the marriage, the plaintiff, upon learning that said conveyances had been made, brought this action for the purpose of having the same set aside:

Held, that plaintiff should have judgment declaring said deeds void as to her, and that she has an inchoate dower right in all said real estate, notwithstanding said deeds, and a future absolute right of dower therein upon the event of the death of her husband in her lifetime.

Held, further, that the wife is not required to wait before bringing her action until her inchoate right becomes absolute by the death of her husband. It is the present injury the plaintiff has sustained, in the loss of her inchoate right in the lands in question, that entitles her to maintain her present action. (*Babcock* agt. *Babcock*, ante, 97.)

2. Where conveyances were made on the eve of the marriage to defraud the wife of the interest in the land which she would have acquired by the marriage, a court of equity will entertain her action for the conservation of the right which she has lost or may lose by the fraudulent acts of the de-

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fendants, and grant her such relief as she may be equitably entitled to. (*Id.*)

3. Where defendant, who was insolvent, being apprehensive of the recovery of a judgment against him by plaintiff, in an action then on trial, and with intent on his part to hinder, delay and defraud his creditors, executed a conveyance of two certain pieces of property to his son, for the nominal consideration of \$1,500, but without actual consideration, and the son immediately conveyed them to his mother, the wife of the defendant, without actual consideration, but for the same nominal consideration:

Held, that the conveyances were fraudulent and void as to the creditors of defendant then existing, and especially as to plaintiff and his judgment, which was recovered about one month after such conveyances. (*Salomon* agt. *Moral*, *ante*, 342.)

4. That the wife of defendant had notice of her husband's fraudulent intent, may be inferred from the circumstances of the case (*See facts in opinion of DALY, J.*). (*Id.*)
5. Where a debtor, with an intention of defrauding his creditors, executes a conveyance of his property without any valuable consideration being paid by the grantee, the conveyance is void as against such creditors, although the grantee was not privy to the fraud. (*Id.*)
6. Where the wife had notice of the fraudulent intent of her husband in conveying the premises to her, and being therefore a party to the fraud, although her husband was actually indebted to her at the time, she is not entitled to a lien on the premises conveyed for the amount of such debt. (*Id.*)
7. Although a review of both the law and the facts of a case tried by a judge or referee may be had

at general term, yet, if no error be shown, the findings of fact, like the verdict of a jury, should be deemed conclusive. (*Id.*)

8. Where a husband takes title to a piece of property in the name of his wife, when he is not insolvent or contemplating it, and when the title is recorded and the husband afterwards becomes unfortunate upon subsequent contracts not then even contemplated, such conveyance will not be held fraudulent as to such *future creditors*. (*Spicer* agt. *Ayers*, *ante*, 405.)

9. A deed, taken in the name of the wife, the consideration-money for which being paid by the husband, is not necessarily fraudulent as to *existing creditors*. The presumption of fraud in such case can be overcome by proof. (*Id.*)

10. The cases of *Carpenter* agt. *Cook* (10 N. Y., 227), and *Case* agt. *Phelps* (39 *id.*, 164) commented on and distinguished. (*Id.*)

11. The supreme court has no power to effect the transfer of the title to land by directing a sale thereof by its officers, except in special cases authorized by the statutes of the state. (*Van Wyck* agt. *Baker*, 10 *Hun*, 39.)

12. In suits by creditors to reach lands conveyed with intent to defraud them, the decree should set aside the fraudulent conveyance and permit the creditor to issue an execution and sell thereunder or compel the debtor to convey to a receiver, and order the latter to sell. (*Id.*)

By one just before marriage, with intent to defraud intended wife of dower—remedy of wife. (*See Youngs* agt. *Carter*, 10 *Hun*, 194.)

GENERAL TERM.

1. A general term has no power to review a case upon the facts on

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appeal from the judgment where the trial was by jury; the only mode in which the facts can be brought before it for review, is by appeal from order of special term or circuit granting or refusing a new trial. (*Boos* agt. *W. M. L. Ins. Co.*, 64 *N. Y.*, 286.)

GIFT.

1. Where a woman, the owner of fifty-six shares of stock in the Home Insurance Company, during an illness, of which she afterwards died, in a letter written in Ireland to her sister in New York made a disposition of the shares to certain persons named in the letter, and also made provision for the payment of a sum of money she owed, and afterwards executed to her sister a power of attorney authorizing her to take all needful measures to effect a transfer of the stock, and the power having been executed by the surrender of the scrips to the company, and the issue of her shares to the donees mentioned in the letter, in part at least during the lifetime of the donor, it not appearing that she owed any debts other than the one named:

Held, that the gifts and dispositions made would not be disturbed by this court, in an action brought by a brother of the donor who sought to set them aside as invalid. (*Duigan* agt. *McCormack*, *ante*, 411.)

GRAND JURY.

- 1 A challenge to the array of a grand jury cannot be allowed (2 *R. S.*, 724, *secs.* 27, 28). (*Carpenter* agt. *The People*, 64 *N. Y.*, 488.)

HABEAS CORPUS.

See Costs.

Matter of Barnett, *ante*, 247.

1. An order quashing a writ of *habeas corpus* can only be reviewed upon appeal. A writ of error will not lie in such case. (*People ex rel. agt. Conner*, 64 *N. Y.*, 481.)

HUSBAND AND WIFE.

1. Where, after marriage, the husband paid the interest on a mortgage on the separate property of his wife, and for its benefit, in pursuance of an agreement between them before marriage, that if he occupied a portion of her premises after marriage, as an office for his business as a physician, he would pay interest on the mortgage in lieu of rent. *Held*, that the agreement was valid, and that the payment was not in fraud of the creditors of the husband. (*Odell* agt. *Mytins*, *ante*, 250.)

INDICTMENT.

1. Upon the arraignment of the plaintiff in error upon an indictment in which he was named "John Barnesciotta, otherwise called Garibaldi," his counsel filed the following plea: "Now comes the defendant Barnesciotta and pleads to the indictment that he is not now, and never was known by the name of Garibaldi, which he verifies," to which plea the people demurred. *Held* (1), that a demurrer was a proper mode of disposing of the plea; (2) that the plea was properly overruled, as the true name preceded the *alias dictus*. (*Barnesciotta* agt. *People* 10 *Hun*, 137.)
2. Upon the trial of an indictment for keeping a disorderly house, it is not necessary to show that it was so kept as to disturb the peace of the general public or of the particular neighborhood; it is sufficient if it be shown that it is a house of prostitution, open promiscuously, and to which large

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numbers of people resort for the purpose of prostitution. (*Id.*)

See POLICE JUSTICE.

Matter of Gessner, ante, 515.

3. In an indictment for perjury alleged to have been committed on an investigation before the fire marshal of New York city, it was alleged that the accused swore there were 60,000 cigars in the building at the time of the fire. The proof was that he swore there were 65,000 cigars. This was one of various items of property as to which the accused was charged with having sworn falsely. On error it was objected that there was a fatal variance between the indictment and the proof. The objection was not taken on the trial. *Held*, that it was not available here, as if made upon the trial, the evidence as to this item could have been excluded or waived, and the jury directed to disregard it, and the conviction could have been sustained upon the proof as to the other items. Also, *held*, that the variance was not material. (*Harris* agt. *The People*, 64 N. Y., 148.)

4. When an indictment charges that the accused has sworn falsely as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offense. (*Id.*)

5. There were two counts in the indictment, the first charging perjury in the oral testimony given before the fire marshal, and the other perjury in swearing to an affidavit before the same officer, containing in substance the same matters as testified to orally. The jury found the prisoner not guilty under the first count and guilty under the second. It was claimed that the verdict was inconsistent. It appeared that a portion of the oral testimony was taken when the fire marshal was not present. *Held*, that the objection was untenable,

as the jury may have found that the oral testimony alleged to be false was not taken before the marshal. (*Id.*)

6. A plea in abatement to an indictment is to be strictly construed; it must be drawn with precision and accuracy and must be certain to every intent. (*Dolan* agt. *The People*, 64 N. Y., 485.)

7. A plea in abatement to an indictment found at a Court of General Sessions in the city of New York alleging that the annual grand jury list was not wholly selected, as required by statute (*chap. 498, Laws of 1853*), from the petit jury lists made out by the commissioner of jurors, without any averments of fraud or design, is not good. The fact that a few names not appearing on the petit jury lists are accidentally put upon the grand jury list does not vitiate the whole list, and that it was by accident or oversight is to be presumed in the absence of allegations of fraud or design. (*Id.*)

8. Nor is it a good plea that some one of the fifty selected as the special panel of grand jurors (*sec. 28, chap. 589 Laws of 1870*) was not upon the petit jury lists, in the absence of an allegation that the persons actually sworn and impaneled were not upon that list. It is necessary also in such a plea to give the names of the persons alleged to have been selected and drawn who were not upon the petit jury lists. (*Id.*)

9. It is not a good plea that the commissioner of jurors was prevented by duress from attending upon or supervising the grand jury. In the absence of allegations as to how the grand jury was drawn and by whom, it is to be presumed that the drawing was made by some other person claiming the office, acting as *de facto* commissioner, and recognized as such by all the officers having relations

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with him or his work ; and a jury drawn by a *de facto* commissioner is regular. (*Id.*)

10. An indictment setting forth a felony and then charging the killing of another by the accused while engaged in the commission thereof, is not void for duplicity. It charges but one offense, that of murder in the first degree, within one of the definitions of that offense in the act of 1873 (*chapter 644, Laws of 1873*), *i. e.*, the killing of a person while engaged in the commission of a felony. (*Id.*)
11. Where one breaks into a dwelling-house burglariously with intent to steal, he is engaged in the commission of the crime until he leaves the building with his plunder ; and if, while engaged in any of the acts immediately connected with his crime, he kills a person resisting him he is guilty of murder under said statute (*Id.*)
12. It is not necessary in an indictment charging the crime of murder under said provision to allege that the killing was "without any design to effect death ;" an allegation that it was willful and felonious is proper and sufficient. The object of the words quoted is to dispense with proof of a design to effect death, not to require proof that there was no such design. (*Id.*)

IMPRISONED DEBTOR.

1. No execution against the body of any party shall issue while there is an execution against his property not returned. The official return of an execution against property, unsatisfied in whole or in part, is a condition precedent to final process against the person. (*New York Guaranty and Indemnity Co. agt. Gleason, ante, 122.*)

2. Where it appears that the applicants were arrested on June 5,

1875, that judgment against them and their co-defendants was entered January 8, 1876, and execution against property was thereupon issued, which is still outstanding; that plaintiff has endeavored to procure the return of such execution by a rule against the late sheriff to whom it was issued, but that the motion was denied on the ground that a warrant of attachment was issued in the action on the 1st of November, 1873 and levied on property that appeared to belong to defendants or some of them; that prior to the receipt of such warrant by the sheriff, he had levied upon the same property under and by virtue of other warrants of attachment issued against the said defendants or some of them, in actions which are still pending and at issue, but which have not yet been brought to trial; and that until the validity and effect of such prior attachments have been ascertained and determined by the rendition of judgments in such other actions, it cannot be known whether the proceeds of the property attached, or any part thereof, will be applicable to the execution herein.

Held, that such a state of facts is "good cause shown" within the meaning of the statute, why the defendants should not be discharged from custody on account of the plaintiff's neglect to charge him in execution within three months after the entry of judgment. (*Id.*)

3. The mere omission to issue execution against the person within the time limited does not constitute the condition upon which the exercise of the power to discharge an imprisoned debtor from custody depends. To warrant the invocation of such power, or its interposition, there must have been a *negligent* omission to issue such execution. There can be no possibility of *neglecting* to do that which cannot be done. (*Id.*)

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4. On an application by an imprisoned debtor for his discharge under title 1, chapter 5, article 6 of part 2 of the Revised Statutes, the discharge will not be granted, where the debtor has been guilty of the acts which he is required to negative by the oath prescribed by the statute; and it is enough to show that the proceedings on the part of the prisoner are not *just and fair*, if the creditor establishes on the hearing that the debtor has disposed of, or made over, any part of his property with intent to injure or defraud any of his creditors, although such acts were committed before the commencement of the action in which he is imprisoned, provided they are shown, also, to be so far connected with the action as to be the grounds upon which the order for his imprisonment therein was based (*Per* EARL, J.; FOLGER, RAPALLO and ANDREWS, JJ., *concurring*). (*Matter of Bruck*, ante, 128.)
5. The provisions of the act, which in effect forbid such discharge, if the debtor has fraudulently disposed of his property, or in case his *proceedings* have not been *just and fair*, contain no limitation as to time, and it is immaterial whether a fraud upon his creditors is perpetrated before his imprisonment in execution, or intermediate the arrest and examination (*Per* EARL, J.; FOLGER, RAPALLO and ANDREWS, JJ., *concurring*). (*Id.*)
6. An appeal lies to the general term of the supreme court, from an order of the special term, discharging a petitioner from imprisonment on execution. It is a special proceeding, as defined by sections 1, 2 and 3 of the Code, but such order is not final and conclusive in the sense that it cannot be appealed from. (*Per* EARL, J.; FOLGER, RAPALLO and ANDREWS, JJ., *concurring*; ALLEN and MILLER, JJ., *dissenting*). (*Id.*)
7. The application for the discharge of an imprisoned debtor, under the fifth article of title 1, chapter 5, part 2 of the Revised Statutes, must be made to certain *officers* specified, and cannot be made to any *court*; and an order by such officer is not appealable either to general term or to the court of appeals. The remedy is by *certiorari*. (*Matter of Roberts*, ante, 199.)
8. The petitioner resided in the county of New York. The application was made to judge DONOHUE, one of the supreme court judges of this county, who made the order for publication July 20, 1876, and to show cause September 2, 1876. On the return day, September 20, 1876 (Saturday), counsel for parties attended, but neither judge DONOHUE nor any other justice was present, and no adjournment was had of the proceedings. On Monday, September 4, 1876, judge WESTBROOK, who was duly assigned to duty in this county, on application of counsel for the petitioner, granted an adjournment until September eight, subject to any objections by opposing creditors that could be taken that day. Two other adjournments were had by the same judge:
Held, that judge WESTBROOK was not, in the sense of the statute, successor of judge DONOHUE, and he lacked the qualification of residence. Under the positive provisions of the statutes, he had no jurisdiction, and the proceedings were out of court. (*Id.*)
9. *It seems*, the doctrine of *res adjudicata* applies to these proceedings. (*Id.*)
10. Where, upon an application made by an insolvent debtor for a discharge, it appears that the petitioner has before, under the same statute, applied to a justice of the supreme court of this state for his discharge, and in that application issue was duly joined, a trial had,

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- and after a full hearing the application was denied upon the merits an order duly entered and served, from which no appeal has been taken, and no application made to open those proceedings or to amend the same, *held*, that the doctrine of *res adjudicata* applies, and the application should be denied. (*Matter of Smal*, ante, 432.)
11. Where, upon an application made by an insolvent debtor for a discharge, it appears that a similar application has already been made to one of the judges of the court of common pleas of the city of New York, and having been fully heard, has been decided against him upon the merits, *held*, that the matter should be regarded as *res adjudicata*, and the application denied. (*Matter of Roberts*, 10 Hun, 248.)
4. This is especially the rule, where no legal remedy exists by which the relief sought could be obtained. (*Id.*)
5. But the plaintiff, in such a case, must aver that he files his complaint not only on his own behalf, but on behalf of all others similarly situated. Such an averment is essential to a complete determination of all the rights affected by the suit. (*Id.*)
6. On December 15, 1873, the defendant, being the owner of four first-class dwelling-houses and lots on Fifth avenue, immediately north of Forty-fourth street, in the city of New York, conveyed, by warranty-deed, to plaintiff, the third dwelling and lot north of Forty-fourth street. The lot thus conveyed was thirty feet in width on Fifth avenue and one hundred feet in depth, and the dwelling thereon was thirty feet wide and sixty feet deep. The southerly line of the plaintiff was the center of a party wall between the buildings of plaintiff and defendant. All four of the dwellings were first-class private residences, and plaintiff was assured by defendant that they would so remain, which assurance was one of the inducements which influenced the purchase. The title under which the defendant holds his property forbids the erection thereon of "a tenement-house." In 1875 defendant remodeled the interior of his two dwellings immediately south of that belonging to plaintiff, and converted them into an establishment known as a French flat or an apartment-house. He also extended his building in the rear to the depth of his lot and erected his wall, which was an extension of the old party wall, several inches upon the property of the plaintiff. He now proposes to erect two additional stories upon his two dwellings, in which erection, by adding to the height of the party wall, he really occupies and builds upon the land of plaintiff, removing the chimneys of her

INJUNCTION.

1. As a general rule the supreme court will not restrain, by injunction, the assessment and collection of a tax. (*Mann agt. Board of Education*, ante, 289.)
2. The rule, however, is not universal. It is subject to three exceptions, in which cases the injunction will be granted:
- First.* Where the proceedings will necessarily lead to a multiplicity of actions.
- Second.* Where they lead to the commission of irreparable injury to the freehold.
- Third.* Where the claim of the adverse party is valid on its face, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved in order to establish the invalidity or illegality. (*Id.*)
3. Whenever a case is made by the pleadings, falling within these exceptions, or either of them, equity will interpose. (*Id.*)

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dwelling and otherwise interfering with her property:

Held, that the completion of the buildings as dwellings, the erection of the party wall between them in a finished state, and the positive declarations of defendant made to plaintiff at the time of the purchase, all show that the party wall, as it existed at the time of the conveyance to the plaintiff, was to be the completed wall between the two buildings. As there is nothing from which any agreement or right to add to the party wall can be inferred, and as all acts and promises point to an opposite one, the injunction asked for must be granted.

Held, also, that the conversion and change by defendant of his two houses into French flat or apartment-house is a violation of his covenant not to erect a tenement-house. A building which is to be occupied by tenants, in name and in fact, is clearly within the true meaning and definition of a *tenement-house*. (*Musgrave* agt. *Sherwood*, *ante*, 811.)

7. The case of *Brooks* agt. *Curtis* (50 *N. Y.*, 639) distinguished. (*Id.*)
8. A court is not justified in interfering with an injunction, unless the equities of the complaint be denied on positive knowledge and not on information and belief. (*Astie* agt. *Leeming*, *ante*, 397.)
9. To authorize an injunction restraining the employment of any agent other than the plaintiff by the successors of one who had contracted that such plaintiff should be his sole agent, it is not necessary to show that the successors knew the terms of the contract under which such agent was appointed; it is sufficient to show that they knew him to be acting as agent; it was for the successor to inquire as to the terms of the appointment. (*Id.*)
10. An objection that the necessary parties are not before the court

must be raised by the answer. If not so raised it must be deemed waived, and cannot be urged upon a motion to vacate an injunction. (*Id.*)

11. The plaintiff procured a temporary injunction restraining the defendant from proceeding with certain work. Upon the return of an order to show cause, the court refused to continue the injunction, and directed that the action be discontinued, without costs. Subsequently defendant moved for a reference to ascertain the damages sustained by the injunction, which motion was denied. *Held*, that this was error, and that the reference should have been granted. (*Waterbury* agt. *Bouker*, 10 *Hun*, 262.)
12. A court of equity will not restrain by injunction, a court-martial from trying one, subject to its jurisdiction, when he alleges as the only ground for such injunction that he has already been tried upon the same charge, and that he apprehends that the second trial will be unfairly conducted. (*Pervault* agt. *Rand*, 10 *Hun*, 232.)
13. Where one of several riparian owners pollutes a stream of water, the party aggrieved is entitled to an injunction restraining him from further corrupting or polluting such stream. (*Seaman* agt. *Lee*, 10 *Hun*, 607.)
14. In an action for an injunction, to prevent a railroad corporation from running its cars over a portion of a highway in front of plaintiff's land, the fee of which, subject to the public use, was in plaintiff, who had never received compensation for the use of said highway by the company, it appeared that the company was induced to construct its railroad upon said avenue by the express consent and license of the plaintiff. *Held*, that plaintiff was not entitled to an injunction. (*Mur-*

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- dock agt. Prospect Park and C. I. R. R. Co.*, 10 *Hun*, 598.)
15. An order of reference, under section 222 of the Code, to ascertain damages upon an undertaking given upon the granting of an injunction, cannot be regularly granted until judgment has been entered; but where the order is entered by plaintiff's consent this obviates the objection. (*Lawton agt. Green*, 64 *N. Y.*, 326.)
 16. The limit of liability upon such an undertaking is the amount specified therein, and the court has no power to make any allowance beyond that amount for disbursements. Referee fees upon the reference are part of the damages, and recoverable as such. (*Id.*)
 17. Accordingly, *held*, that an allowance for disbursements and referee fees over and above the sum specified in the undertaking was error. (*Id.*)
 18. Such a proceeding is not a proceeding "in the action;" it is a proceeding after judgment, constituting no part of the action, and the court has no power to give costs therein. (*Id.*)
 19. The final order in such proceedings should be limited to fixing the amount of damages, and a provision therein requiring the plaintiff to pay the same is improper. The amount of damages so ascertained is conclusive upon the parties and the sureties, but payment can only be enforced by action upon the undertaking. (*Id.*)
 20. If a craft of any kind is adapted for use in any employment for which a canal may lawfully be used, and is actually employed in a business lawful in itself, and does not in the conduct of such business unreasonably or unnecessarily obstruct the navigation of the canal by other vessels, a court of equity will not forbid the use of the craft in such employment; and this, although some obstruction to the free passage of vessels necessarily results from the peculiar employment. (*Horton agt. People*, 64 *N. Y.*, 610.)
 21. It is not the province of a court of equity to proscribe one branch of a business in which a party is engaged, while permitting every other branch of the same business to be carried on in the same locality and with the same instrumentalities. (*Id.*)
 22. Defendants were the owners of a floating elevator, which was used by them in the "Buffalo City Ship canal" (an artificial channel forming part of the harbor of that city), for the purpose of transferring grain in bulk from lake vessels to canal boats, moving from place to place as required. When not in use it was moored opposite lands owned by defendants. The channel of the canal is 160 feet wide. When employed in unloading a vessel, with the vessel on one side and a canal boat on the other, the three crafts occupy less than eighty feet of the channel, and a transfer of the load of a vessel is made in a few hours. Vessels moving in the canal are moved by steam power. In an action by the attorney-general in behalf of the people, a judgment was rendered restraining such use, but allowing the use of the elevator for unloading vessels aground or for any other purpose. *Held*, error; that the use was not an unnecessary, unreasonable and unlawful use of the canal, or an unreasonable and unlawful obstruction to trade and commerce, but was in aid of commerce. (*Id.*)
 23. It is not an excuse for the violation of an injunction that the order is more extensive in its restraints than the prayer of the complaint; the order, if irregular, is not void, and while it is in

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force it is the duty of the defendant to obey it. (*Mayor, &c., agt. N. Y. and S. I. F. Co., 64 N. Y., 622.*)

24. Corporations may be restrained by injunction, and may be fined for violating the injunction. (*Id.*)

25. Where, upon motion to punish a party for contempt in violating an injunction, there is legal evidence sufficient to call for the exercise of the judgment and discretion of the court, its decision is not reviewable here. (*Id.*)

26. A party, bound to obey, an injunction, may be guilty of a violation thereof as well as aiding, abetting and countenancing others in violating it as by doing it directly; such orders must be honestly and fairly obeyed. (*Id.*)

27. Where proceedings to punish a party for contempt, in violating an injunction, are commenced by an order to show cause, interrogatories need not be filed prior to a final adjudication upon the alleged contempt. (*Id.*)

28. A mortgage executed by a mining corporation upon lands in Colorado authorized a sale, after certain specified notices, in the city of New York. In an action to restrain a sale as thus authorized, held, that in the absence of any statute regulation the parties had the power to agree upon the manner of sale; that the statute of this State, in reference to the sale of mortgaged premises, had reference only to real estate in the State; and there being no proof that a sale as provided for in the mortgage was in conflict with the laws of Colorado, there was no ground for equitable interference. (*Carpenter agt. B. H. G. M. Co., 65 N. Y., 43.*)

29. By statute (*chap. 257, Laws of 1870*) the then trustees (who are named) of defendant, a religious corporation, were authorized to make disposition of a fund belong-

ing to the corporation, for other than corporate purposes. This action was brought to restrain such disposition, the complaint alleging the act to be unconstitutional, and that the trustees named intended and were proceeding to make such disposition of the fund; there was no allegation that the corporation itself contemplated any action. Held, that the exercise of the power was conferred by the act upon the trustees as individuals, and no cause of action was set forth against defendant; that to enable the court to pass upon the constitutionality of the act, the persons claiming to exercise authority under it should be made parties. (*Davis agt. Trustees, etc., 65 N. Y., 278.*)

30. One whose assessment is increased by such an unauthorized omission of lands of another, may maintain an action against the city to restrain the enforcement of the assessment. (*Hassen agt. City of Rochester, 65 N. Y., 519.*)

31. An order granting, denying, continuing or setting aside a preliminary injunction is not reviewable in this court, and the court will not entertain an appeal therefrom for the purpose of determining the right of plaintiff to maintain the action. (*Calkin agt. Man. Oil Co., 65 N. Y., 557.*)

INSOLVENT LAW.

1. The statute of New Jersey entitled "An act to secure to creditors an equal and just division of the estates of debtors, who convey to assignees for the benefit of creditors," passed April 16, 1846, by its provisions is an insolvent law, and as such is suspended by operation of the United States bankrupt law; and an assignment made thereunder confers no title to the property upon the assignees and is void as against creditors. (*Boese agt. Locke, ante, 148.*)

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INSURANCE (LIFE).

1. The proceeding authorized by the statute of 1853 (*Laws of 1853, chap. 463, section 17*) which makes it the duty of the attorney-general (upon the report of the superintendent of the insurance department that the assets of any life insurance company are insufficient to reinsure the outstanding risks) to apply to the supreme court to decree a dissolution of such company, and a distribution of its effects, including the securities in the hands of the comptroller, is *exclusive*, and is now the only mode of dissolution of a life insurance company. (*Attorney-General agt. Continental Life Insurance Co., ante, 16.*)

2. A stockholder or a creditor of a life insurance company cannot now bring an action, under the Revised Statutes, in behalf of himself and all other stockholders for the dissolution of such company, and the distribution of its assets, as such proceeding is *superseded* by the act of 1853. (*Id.*)

See ASSIGNMENT.

Fowler agt. Butterly, ante, 471.

See EQUITY.

Mausbach agt. The Metropolitan Life Insurance Co., ante, 496.

IRREGULARITY.

1. No person can avail himself of an irregularity in the appointment of a receiver in supplementary proceedings except the judgment debtor himself. (*Underwood agt. Sutcliffe 10 Hun, 453.*)

JAIL LIMITS.

1. If a creditor gives his debtor permission to go off the jail limits or to go at large, the right to imprison is gone, and the debtor cannot be again taken in execution for the same debt. (*Vidvard agt. Fradneburg, ante, 339.*)

2. Where proceedings for discharge of defendant, who was in custody, were pending before the Oneida county court, on the twenty-third of December, but were not completed, defendant's counsel told the court that as Monday following was Christmas, "it was too bad to keep defendant in custody till Tuesday." The judge appealed to plaintiff's counsel for magnanimity, and he replied: "If the debtor appears on Tuesday no suit will be brought against the sureties on the jail-limits bond, but I do not mean to, nor do I wish to, waive any of my legal rights." The defendant, under these circumstances, went off the limits and did not return, and a second execution was issued after the county court had refused his discharge:

Held, that the defendant never had the permission of the plaintiff to go at large, and therefore, in the absence of legal proceedings for his discharge, he was rightfully taken into custody and remains rightfully imprisoned. (*Id.*)

JUDGMENTS.

1. The decree or judgment of one court cannot be shown in another by the oral statement of a witness; the record, or an exemplified copy thereof, must be produced. (*Helmbold agt. Henry T. Helmbold Manufacturing Co., ante, 454.*)

2. This action was brought by the plaintiff to recover the value of certain wood sold to the defendant, who, with one Deen, were manufacturing brick as assignees of one Horne. The wood was sold upon the agreement of the defendant to be personally responsible therefor. The defendant set up a counter-claim for bricks sold by him and Deen to the plaintiff. Upon the trial the court refused to receive in evidence a judgment recovered after the commencement of this action, in an action brought against the defendant

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- Tuthill and Dean, as assignees, for an accounting, in which Tuthill charged himself with the price of the brick as so much money received from the plaintiff. *Held*, that the judgment should have been received in evidence, although recovered after the commencement of this action, and that as it appeared thereby that the defendant had become the owner of the claim against the plaintiff, he was entitled to set it up as a counter-claim, in this action. (*Vail* agt. *Tuthill*, 10 *Hun*, 31.)
3. After a motion for a new trial has been made upon the minutes of the justice before whom the action was tried, and by him denied, it is error for another justice to entertain and grant another motion to set aside the judgment on the ground of "error and manifest injustice." (*Knapp* agt. *Post*, 10 *Hun*, 35.)
 4. A new trial can only be granted in such a case upon an appeal from the first order. (*Id.*)
 5. The plaintiff recovered a judgment against the defendant Swift in January, 1868. On appeal the same was modified by the court of appeals, and the modified judgment was entered in plaintiff's favor on the 27th of March, 1873. In October, 1868, Swift commenced an action against the plaintiff, and on the 10th of November, 1870, a judgment in his favor was entered upon the report of a referee. Before taking up the report Swift assigned to his attorney, the defendant Burt, his claim and the said report, in payment of services rendered and to be rendered in both actions, and thereafter assigned the judgment to him. (*Prouty* agt. *Swift*, 10 *Hun*, 232.)
 6. In this action, brought by the plaintiff to have the judgment recovered by Swift set off against the one in plaintiff's favor, *held*, that the assignment vested an absolute title to the judgment in Burt, and that when plaintiff's judgment was finally entered against Swift, the latter had no judgment against him which could be set off against it. (*Id.*)
 7. Distinctions between rights arising under an attorney's lien upon a judgment and under an assignment thereof, and of remedy by motion and action to offset judgments considered. (*Id.*)
 8. In an action to recover the possession of personal property, which has not been delivered to the plaintiff, the jury should assess the value of the property and damages for its detention, and not simply find a general verdict for damages; and the judgment in such a case should be for the recovery of the property, or the value thereof in case a delivery could not be had, together with damages for its detention. (*Phillips* agt. *Melville*, 10 *Hun*, 211.)
 9. In an action against Eckert as maker and Bishop as indorser of a promissory note, the former answered and the latter suffered a default; upon the trial a judgment was entered against both for damages and costs. Upon an appeal by Eckert the general term reversed the judgment and granted a new trial. Upon the second trial Eckert was successful and recovered judgment against plaintiff for his costs. Subsequently plaintiff issued an execution against Bishop under the original judgment, in which was included the costs. Upon a motion to set aside the execution, *held*, that upon reversal of the former judgment none existed against Bishop under which an execution could issue, and that, in any event, Bishop could not be charged with the costs incurred by the defense interposed by Eckert. (*Hawk* agt. *Bishop*, 10 *Hun*, 509.)

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10. Where the owner of premises conveyed to him subject to a mortgage, in ignorance of the lien thereon of a judgment against a former owner, subsequent to the mortgage, pays the mortgage and causes the same to be satisfied of record, he is entitled to have the same reinstated as a lien prior and paramount to the lien of the judgment. (*Barnes* agt. *Mott*, 64 N. Y., 397.)
11. Where lands incumbered by a judgment are conveyed with covenants of warranty to a purchaser for full value, the grantee and his successors in interest occupy a position similar to that of sureties for the judgment debtor and are entitled to the same equities. A release by the judgment creditor without their consent and with knowledge of their rights of any security to which, in equity, they would be entitled on payment of the judgment, discharges the lien of the judgment. (*Id.*)
12. Accordingly *held*, where, after such a conveyance, the judgment debtor gave an undertaking on appeal from the judgment securing the amount thereof and staying proceedings to enforce the same, and after affirmance of the judgment the judgment creditor, with knowledge of the equitable rights of the owner and without his consent, released the sureties in the undertaking, that thereby the lien of the judgment was discharged. (*Id.*)
13. *It seems*, that the same principle would apply without regard to the covenants in the deed. (*Id.*)
14. A right to set off a judgment in favor of A. against B., against a judgment in favor of B. against A., cannot be asserted by motion on behalf of A., where it appears that before B.'s judgment was obtained he assigned his claim to a third person. If A. has any equities they can only be enforced by

action, not by motion. (*Swift* agt. *Prouty*, 64 N. Y., 545.)

See APPEAL.

Pulte agt. *Diossy*, ante, 270.

JUDICIAL SALE.

1. A court for mere inadequacy of price, unconnected with any other reason or cause, will not order a resale unless the price obtained be so grossly inadequate as of itself to furnish evidence of fraud. (*People* agt. *Bond Street Savings Bank*, ante, 336.)
2. Where property has been sold at a judicial sale, the court will not, when the sale has been well advertised and a large attendance of buyers secured, and there has been no surprise, misunderstanding or fraud, and no binding offer from any responsible party to pay a larger sum upon a resale, refuse to confirm such sale merely because some persons say they will pay a larger price hereafter, especially when such an opportunity has been fairly afforded and refused. (*Id.*)

JURISDICTION.

1. By the act of 1873, chapter 239, the court of common pleas of the city of New York has jurisdiction over a defendant, served with process in any county of the state, and this includes actions where the cause of action arose in the city of New York, but the defendant did not reside there, as well as actions where the cause of action did not arise and defendant did not reside in the city. (*Gemp* agt. *Pratt*, ante, 83.)
2. The "Code of Civil Procedure," section 268, subdivision 2, provides in express terms that this court shall have jurisdiction in such cases, and the codifiers state that revision to be, in their opinion,

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declaratory of the law as it now exists. (*Id.*)

8. Where the jurisdiction of a justice in an action depends upon the voluntary appearance of a party, such party may assail or defend against a judgment rendered against him by showing that he did not appear, or that the appearance of any one for him was unauthorized. (*Sperry* agt. *Reynolds*, 65 N. Y., 179.)
4. Where an appearance has been put in for a party by another person, the authority of the latter cannot be presumed, but must be made to appear in order to bind the party or to give the justice jurisdiction (*LOTT, Ch. C., and GRAY, C., dissenting.*) (*Id.*)
5. The provision of the Revised Statutes (1 R. S., 233, sec. 45) providing that the authority to appear in Justice's Court by attorney must be proved unless admitted by the opposite party, was designed simply to protect the opposite party from an unauthorized appearance. A waiver of proof by such party cannot affect the rights of the party for whom the appearance is made (*LOTT, Ch. C., and GRAY, C., dissenting.*) (*Id.*)
6. Accordingly, *held* (*LOTT, Ch. C., and GRAY, C., dissenting.*), where the record upon appeal from justice's court showed no legal service of the summons, that defendant did not appear, but that one C. appeared for him, without showing any authority in the latter; that the record failed to show jurisdiction, and the judgment could not be sustained (*LOTT, Ch. C., and GRAY, C., dissenting.*) (*Id.*)
7. The distinction in this respect between justices' courts and courts of record having attorneys, pointed out. (*Id.*)
8. The giving of a bond in the form prescribed by the statute in relation to justices' courts (2 R. S., 230 sec. 29), is necessary to confer jurisdiction upon the marine court of the city of New York to issue an attachment. An instrument without a seal is not sufficient, and an attachment issued thereon is void. (*Tiffany* agt. *Lord*, 65 N. Y., 310.)
9. The appearance of the defendant for the purpose of moving to set aside the attachment is not a waiver of the objection, and does not give jurisdiction or deprive the defendant of his right to bring an action for the unlawful taking of his property by virtue of the attachment. (*Id.*)
10. Where a mechanic's lien for materials furnished directly to the owner is in force at the time of the commencement of proceedings to enforce it, but ceases during the pendency of the proceedings, because of failure to obtain an order for its continuance, the court having acquired jurisdiction may retain it, and render a personal judgment. (*Darrow* agt. *Morgan*, 65 N. Y., 333.)

JURY.

1. The jury retired to consider their verdict, and after being absent for a long time returned into court and reported that they were unable to agree, and thereupon they were further instructed by the court, and in closing the instructions the court stated to them as follows: "You must agree upon a verdict; I cannot discharge you until you agree upon a verdict." The jury retired and very soon returned into court and rendered their verdict of "no cause of action."
- Held*, that this verdict cannot be said to be the judgment of the jury acting without constraint and in the discharge of their obligations to render a true verdict according to the evidence, and, therefore, ought not to stand. (*Stater* agt. *Mead*, ante, 57.)

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2. The proper mode of redress in such case is by motion to set aside the verdict. (*Id.*)
3. The alleged declarations of jurors as to the grounds of their verdict, cannot be received to impeach it. The affidavits of the jurors themselves could not be received for that purpose, and much less their unsworn statements made to a third person. (*Gale* agt. *New York Central and Hudson River Railroad Co.*, ante, 385.)
4. If the prevailing party to an action, with a view of influencing a juror by placing him under obligations to him, seeks and obtains an opportunity so to do, a new trial will be granted. In such case the court could see that an effort had been made to improperly influence, and it would not stop to inquire whether the attempt had or had not been successful, but would assume that the party had, at least, partly succeeded in that which he had attempted. (*Id.*)
5. When, however, the court is satisfied that there has been no attempt by the successful party to unduly influence a juror, either by conversation or by placing him under obligations, and that his action has not in fact been improperly influenced, then, even though the act may have been indiscreet, the court will not disturb the verdict. (*Id.*)
6. On a Friday during the progress of the trial, the jury having been discharged till the following Monday, one of the jurors, being about twelve miles from home and having failed to obtain any other equally comfortable opportunity to reach his residence, asked the plaintiff, who had to go for a number of miles in the same direction, for permission to ride with him. To this the plaintiff consented. It was abundantly shown that nothing whatever concerning the cause upon trial was spoken of or discussed, nor were any words exchanged between the juror and the plaintiff, except when the juror left the sleigh, at the point where their routes homeward diverged, the juror thanked the plaintiff for kindness. Before the close of the trial the juror reported what he had done to the court, and the fact was known to the defendant's counsel, who made no objection to the juror for this reason. On motion to set aside the verdict for this cause:
Held, that the act done was not an officious one thrust by the prevailing party upon the juror for the purpose of procuring his good will and thus influencing action, but it was the result of neighborly courtesy and kindness, without any evil intent whatever, and is no ground for disturbing the verdict.
Held, also, that the fact that the juror rode home with the plaintiff being known to the defendant's counsel before the close of the trial, whilst the defendant would not, perhaps, be precluded from raising any objection founded upon any improper attempt to influence, which was then unknown, yet the objection, based upon the mere ride with the plaintiff, because not then made, must be deemed to have been waived. (*Id.*)
7. Where the defense to an action on a fire policy was that the risk was increased without the assent of the insurers contrary to the terms thereof, by reason of the premises becoming and being unoccupied, and upon the trial three witnesses called by the defendant (the insurance company) testified that they were insurance agents, and the risk was increased by the non-occupancy of the premises, and no witnesses were called by the plaintiff on this point. (*Cornish* agt. *Farm Buildings Fire Ins. Co.*, 10 Hun, 466.)

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8. Defendant's counsel asked the court to direct a verdict on the ground that it was proved, without contradiction, that the risk had been increased. *Held*, that it was not error for the court to refuse so to do; that although the evidence was competent, and entitled to great weight, the jury had the right to decide the question of increase of risk upon their own views upon that question. (*Id.*)
9. A challenge to the array of a grand jury cannot be allowed (2 R. S., 724, secs. 27, 28). *Carpenter* agt. *People*, 64 N. Y., 488.)
10. A challenge to the array of petit jurors, at a court of general sessions for the city and county of New York, alleged that the jurors were not selected by the commissioner of jurors of said county, and that neither he nor any one on his behalf attended the drawing; but that the jurors were selected by one appointed by the mayor as commissioner, and that the statute under which the mayor acted was unconstitutional. *Held*, that the challenge showed upon its face that the jury were selected by an officer *de facto*, whose acts, in the exercise of the functions of the office, were valid as to the public, and whose appointment could not be questioned collaterally; and that therefore a demurrer to the challenge was properly sustained. (*Id.*)
1. An action in justice's court, or in the marine court of the city of New York, cannot be commenced by short attachment against a resident of the county. (*Haviland* agt. *Wehle*, 65 N. Y., 85.)
2. This process is only proper in the cases specified in section 33 of the act to abolish imprisonment for debt, etc. (*chap. 800, Laws of 1881*), i. e., where the defendant is a non-resident of the county, and where, by the provision of section 80 of said act, no warrant can issue against him. (*Id.*)
3. In all other cases where an attachment is proper, a long attachment must be used. (*Id.*)
4. A constable's return to a justice's court summons was as follows: "Served, copy left the 9th day of February, 1869." *Held*, that the return was insufficient to show a legal service by copy, or to authorize the justice to proceed in the action in the absence of defendant. (*Sperry* agt. *Reynolds*, 65 N. Y., 179.)
5. Where the jurisdiction of a justice in an action depends upon the voluntary appearance of a party, such party may assail or defend against a judgment rendered against him by showing that he did not appear, or that the appearance of any one for him was unauthorized. (*Id.*)
6. Where an appearance has been put in for a party by another person, the authority of the latter cannot be presumed, but must be made to appear in order to bind the party or to give the justice jurisdiction (Lott, *Ch. C.*, and GRAY, *C.*, dissenting). (*Id.*)
7. The provision of the Revised Statutes (1 R. S., 233, sec. 45), providing that the authority to appear in justices' court by attorney must be proved unless admitted by the opposite party, was designed simply to protect the opposite party from an unauthorized appearance. A waiver of proof by such party cannot affect the rights of the party for whom the appearance is made (Lott, *Ch. C.*, and GRAY, *C.*, dissenting). (*Id.*)

JUSTICE'S COURT.

Summary proceedings—sufficiency of affidavit to procure summons—certificate of service of summons by constable is "due proof." (*See People ex rel. Hughes* agt. *Lamb*, 10 Hun, 348.)

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8. Accordingly, *held* (LOTT, *Ch. C.*, and GRAY, *C.*, *dissenting*), where the record upon appeal from justices' court showed no legal service of the summons, that defendant did not appear, but that one C. appeared for him, without showing any authority in the latter, that the record failed to show jurisdiction; and the judgment could not be sustained. (*Id.*)
9. The distinction in this respect between justices' courts and courts of record having attorneys, pointed out. (*Id.*)
10. It is not necessary in order to present upon appeal the point that the return to a summons in justice's court is insufficient to give jurisdiction, or that it does not appear that the appearance of another person for defendant was authorized, that these grounds should be specifically stated in the notice of appeal; a general statement therein as a ground for appeal that the justice had no jurisdiction is sufficient (LOTT, *Ch. C.*, and GRAY, *C.*, *dissenting*). *Id.*)

LANDLORD AND TENANT.

See PLEADING.

Brown agt. *Ourran*, ante, 303.

See LEASE.

Stern et al. agt. *Florence Sewing Machine Co.*, ante, 478.

LAW AND FACT.

1. Although a review of both the law and the facts of a case tried by a judge or referee may be had at general term, yet, if no error be shown, the findings of fact, like the verdict of a jury, should be deemed conclusive. (*Salomon* agt. *Moral*, ante, 342.)

LEASE.

1. An assignee of a lease is not liable for rent of the demised premises,

except for the time he occupies them, and may at any time terminate his liability for rent by assigning the lease. (*Stern* agt. *Florence Sewing Machine Co.*, ante, 478.)

2. Plaintiff rented to J. J. M. & Co. certain premises, and they went into possession of same in February 1869, and occupied up to January 1, 1870, at which time defendant went into possession. The lease was dated October 15, 1870, and was for a term ending May 1, 1872, at the annual rent of \$900, from said fifteenth October until May 1, 1871, and at the rate of \$1,050 from last-mentioned date until the end of the term. The plaintiff, by said lease, agreed to heat and warm said premises in a comfortable manner. J. J. M. & Co., being indebted to defendants, and being insolvent and unable to pay, defendants purchased their stock of sewing machines and took an assignment of their property, among which was the lease in question. The defendants, through their agent, asked plaintiff if he would be willing to assign the lease to them, and he replied that he would, provided he got his pay promptly and they assumed all the responsibility of J. J. M. & Co., and paid him his rent promptly, which defendants, through their agent, agreed to do, and thereupon plaintiff executed the consent on the lease:

Held, that the agreement of the defendants to pay rent (if such an agreement was, in fact, made) was without consideration to support it, and that what passed between plaintiff and the agent of defendants could not be construed into a new and distinct agreement to rent the premises and to pay rent otherwise than as specified in the written lease.

Held, also, that plaintiff having agreed to heat the premises rented to the defendants, and having violated that agreement, the defendant was entitled to recover, by way

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of counter-claim, such damages as it showed itself entitled to. (*Id.*)

LIFE INSURANCE COMPANY.

1. The provisions of section 7 of chapter 902 of the Laws of 1869 make it the duty of the superintendent of the insurance department, whenever the affairs of any life insurance company which has deposited securities under this act, or the act hereby amended, shall, *in his opinion*, appear in such a condition as to render the issuing of additional policies and annuity bonds of said company injurious to the public interests, to report that fact to the attorney-general, *whose duty it shall then be* to apply to the supreme court for an order requiring the company to show cause why a receiver should not be appointed, and its business closed up. (*Attorney-General agt. Atlantic Mutual Life Insurance Co., ante, 227.*)
2. When the superintendent reports to the attorney-general as the statute prescribes, the latter *must* submit the facts to the court, and that tribunal *must* proceed as the law directs. (*Id.*)
3. The supreme court has no power to review the preliminary action of the superintendent in making his report. If any error has been committed or mistake made by the superintendent, the hearing, and that alone, will remedy it. (*Id.*)
4. But it must be proved, to the satisfaction of the court, upon the investigation, that there is danger to the public interests by the continuance of the business of the company, before it would be warranted in making the final order, arresting future operations and appointing a receiver. (*Id.*)
5. Where it appears to the satisfaction of the court that the assets and funds of a life insurance com-

pany are not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations, the act (*Laws of 1869, chapter 902*) is *imperative* as to the duty of the court to enjoin the company from the further prosecution of its business, and to appoint a receiver of all the assets and credits of the company. (*Attorney-General agt. Atlantic Mutual Life Insurance Co., ante, 300.*)

LOST INSTRUMENT.

1. Parol evidence to prove the contents of a lost deed should show that the deed was duly executed as required by law, and should show substantially all the contents. The testimony of a witness who has simply heard the deed read, and who can give but a small portion of its contents, is insufficient. (*Edwards agt. Noyes, 65 N. Y., 125.*)

MALICIOUS PROSECUTION.

1. ~~A~~ cause of action for a false imprisonment, and a cause of action for a malicious prosecution, when both arise out of one and the same transaction, may be respectively alleged in different counts of the same complaint. (*Barragt. Shaw, Hun, 580.*)

MANDAMUS.

1. *Mandamus* is the appropriate remedy to compel the assessment of damages done by reason of the change of the grade of a street. (*People ex rel. Myer agt. Board of Assessors, ante, 280.*)
2. It is the duty of the board of assessors of the city of New York to estimate such damages when applied to, notwithstanding the expense of the work of conforming

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- to the new grade has not been certified to them. (*Id.*)
3. Where a statute directs payment to be made in a particular manner, as by the issue of assessment bonds, the comptroller may be compelled by *mandamus* to act as directed by the statute. (*Id.*)
 4. In a return to a writ of alternative *mandamus* directed to the comptroller requiring him to lease from relators certain premises as authorized and directed by the common council, or to show cause, &c., the comptroller alleged, in substance, that there was no sufficient appropriation to pay the rent. *Held*, that he was estopped from claiming that it was not his duty to execute the lease, and that the common council had no authority to require him to do so, as he had not based his refusal or his defense to the writ upon that ground. (*People ex rel. agt. Green*, 64 N. Y., 499.)
 5. An order directing the issuing of a writ of peremptory *mandamus* to compel the performance of an act required by law is only proper in case of a clear, unquestioned, legal right. It should not be granted where the claim is disputed and its validity controverted. (*People ex rel. Mott agt. Bd. Suprs. Greene Co.*, 64 N. Y., 600.)
 6. In such case an alternative writ should issue. (*Id.*)
 7. Where, upon the return of an order to show cause why a *mandamus* should not issue, the relator takes no issue upon the allegations of the affidavits and papers presented by defendant, but proceeds to argument and asks for a peremptory writ; this is equivalent to a demurrer, *i. e.*, it is an admission of the truth of those allegations, as statements of facts, but a denial of their sufficiency in law to prevent the issuing of the writ, and if the papers set forth facts showing the relator not entitled to the relief sought, the writ cannot be granted. (*People ex rel. Tenth Nat. Bank agt. Board Apportionment*, 64 N. Y., 627.)
 8. Where a party has a remedy by action, relief by *mandamus* will be denied. (*Id.*)
 9. An order of a county court granted upon notice to the board of supervisors of the county, in pursuance of the act of 1871 extending the powers of such boards (*chap. 595, Laws of 1871*), recommending said board to correct an erroneous assessment and to refund to the party aggrieved the amount erroneously assessed, is mandatory, and upon failure of the board to appeal has the same legal effect as a final judgment. (*People ex rel. agt. Supervisors*, 65 N. Y., 300.)
 10. A *mandamus* will lie against the board to compel obedience to such order, in case of its refusal to comply therewith. (*Id.*)

MARINE COURT.

1. An action in justice's court, or in the marine court of the city of New York, cannot be commenced by short attachment against a resident of the county. (*Huriland agt. Wehle*, 65 N. Y., 85.)
2. This process is only proper in the cases specified in section 33 of the act to abolish imprisonment for debt, etc. (*chap. 300 Laws of 1831*), *i. e.*, where the defendant is a non-resident of the county, and where, by the provision of section 30 of said act, no warrant can issue against him. (*Id.*)
3. In all other cases where an attachment is proper a long attachment must be used. (*Id.*)
4. The giving of a bond in the form prescribed by the statute in rela-

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tion to justices' courts (2 R. S., 280, sec. 39), is necessary to confer jurisdiction upon the marine court of the city of New York to issue an attachment. An instrument without a seal is not sufficient, and an attachment issued thereon is void. (*Tiffany* agt. *Lord*, 65 N. Y., 310.)

MARRIED WOMEN.

See ASSIGNMENT.

Fowler agt. *Butlerly*, ante, 471.

1. In order to charge the separate estate of a married woman with a debt it is not necessary that there be a specific agreement to that effect. The intent may be inferred from the surrounding circumstances. (*Contin* agt. *Cantrell*, 64 N. Y., 217.)
2. Defendant, a married woman, lived separate and apart from her husband. She had a separate estate and supported herself. Plaintiff did work as seamstress, under a contract with her, for herself and children. Defendant, before the work was done, informed plaintiff that she had a separate estate, and plaintiff testified she trusted her for that reason. Defendant promised to pay when she received her rents. In an action to recover for the work, *held*, that the evidence was sufficient to authorize a finding of an intent to charge defendant's separate estate and to sustain a judgment against her. (*Id.*)

MECHANIC'S LIEN.

1. In order to perfect a lien under the mechanic's lien law, the claim or notice filed with the county clerk must contain certain statements, the truth of which must be positively sworn to by a person acquainted with the fact. Among these statements is that relating to

the ownership of the premises. (*McElwee* agt. *Sanford*, ante, 89.)

2. In an action to foreclose a mechanic's lien under the act, chapter 379, Laws of 1875, the claimant's notice stated that James Meehan was owner. In his complaint he averred that James Meehan was not the owner, but that Elizabeth Meehan was, and that her name was erroneously omitted by mistake, and the name of James Meehan was inserted because he was informed and believed that James Meehan was owner:

Held, that the notice of lien was defective and formed no basis for the action; James Meehan being the *reputed owner*, merely, the notice of lien should have so stated. (*Id.*)

3. The word "labor," as used in chapter 478 of 1863, providing that any person who shall hereafter perform any labor in building, altering or repairing any house shall, upon filing the notice required by that act, have a lien for the value of such labor, does not include the services rendered by an architect in superintending the erection of a house, and he is not entitled to a lien on the house for the value thereof. (*Stryker* agt. *Cassidy*, 10 Hun, 18.)
4. Plaintiff entered into an agreement with defendant, who was in possession of land under a contract, to repair a building thereon for \$3,286, and took a mortgage upon other land to secure said sum. Upon the completion of the work he filed a mechanic's lien, foreclosed the mortgage, realizing thereby \$1,025, and entered a personal judgment for a deficiency. (*Hall* agt. *Pettigrove*, 10 Hun, 609.)
5. In an action to foreclose the lien, it was claimed that by taking and foreclosing the mortgage and entering the judgment he had waived his right to the lien. *Held*,

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that he was entitled to pursue all the remedies he had until he realized the amount of his claim. (*Id.*)

6. *It seems*, that the provisions of the mechanic's lien law of 1865 for the county of Rensselaer (*chap. 778, Laws of 1865, published in vol. 1, Session Laws of 1866, p. 69*) relate and apply to every person who does work or furnishes materials towards the erection, alteration or repair of any house or building in said county, without regard to the person upon whose credit the work was done or the materials furnished. (*Cheney* agt. *T. H. Association*, 65 *N. Y.*, 282.)
7. The lien given by said act, where the owner has not himself contracted the debt for which the lien is created and sought to be enforced, only extends to the amount due and payable by him at the time of filing the notice creating the lien by the terms of the contract under which the work is being done, adding thereto any sums paid by collusion for the purposes of avoiding the provisions of the act or paid in advance upon the contract. (*Id.*)
8. In an action to enforce a lien created under that act, the owner may, for the purpose of reducing or defeating the claim, avail himself of all matters allowable by way of recoupment or counterclaim arising out of the contract between the owner and the contractor, and which would be available against the contractor, in an action by him, the rights of the parties being determined by the facts existing at the time of the creation of the lien. (*Id.*)
9. *It seems* that the provision of the mechanic's lien law for New York city of 1863 (*sec. 4, chap. 500, Laws of 1863*), providing that any person having filed a lien may, "in ten days thereafter," institute a

proceeding to enforce or foreclose it, does not require, but prohibits the commencement of a proceeding within ten days. (*Darrow* agt. *Morgan*, 65 *N. Y.*, 383.)

10. Where the claim, to secure which the notice of lien is filed, is for materials furnished to a contractor with the owner, it should be so stated in the notice, but the defect is not a fatal one; and where the complaint in a proceeding to foreclose the lien contains all the necessary allegations and the parties go to trial, the defect may be disregarded or the proceeding amended. (*Secs. 2, 5. Id.*)
11. Under the provision of said act, providing for the continuance of a lien "by order of court," the order of any court having jurisdiction of such liens is sufficient. (*Id.*)
12. No notice of application for such an order is necessary, unless the court to which application is made requires it. (*Id.*)
13. Where a lien for materials furnished directly to the owner is in force at the time of the commencement of proceedings to enforce it, but ceases during the pendency of the proceedings, because of failure to obtain an order for its continuance, the court having acquired jurisdiction may retain it, and render a personal judgment. (*Id.*)

MISJOINDER.

1. Defendant Horwitz having been arrested in an action brought by plaintiff to recover the possession of certain personal property, an undertaking was given on the third of April by the defendants Horwitz, Freudenthal and Dodds, by which they bound themselves that the defendant should, at all times, render himself amenable to process, etc., and for the payment

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to the plaintiffs of such sum as might be recovered against him. On the twenty-seventh of May, another undertaking was given by the defendants Dodds and Jopha, in the form and to the effect required by section 211 of the Code. (*Cook agt. Horwitz*, 10 *Hun*, 586.)

2. Plaintiffs having recovered judgment in the action, and an execution issued thereon having been returned unsatisfied, brought this action against all the sureties to both undertakings. *Held*, that a demurrer, interposed by the defendant on the ground of an improper joinder of separate causes of action, was proper and should be allowed. (*Id.*)

MISNOMER.

1. Upon the arraignment of the plaintiff in error upon an indictment in which he was named "John Barnesciotta, otherwise called Garibaldi," his counsel filed the following plea: "Now comes the defendant Barnesciotta and pleads to the indictment that he is not now, and never was known by the name of Garibaldi, which he verifies," to which plea the people demurred. *Held* (1) that a demurrer was the proper mode of disposing of the plea; (2) that the plea was properly overruled, as the true name preceded the *alias dictus*. (*Barnesciotta agt. People*, 10 *Hun*, 137.)

MORTGAGE.

1. Where a mortgage was made without consideration, but was assigned by the mortgagee as a valid security to a *bona fide* purchaser for an amount less than its face, the purchaser relying upon the representations of the mortgagor and mortgagee that the mortgage had been issued for its full value,

Held, that the assignee, upon a sale by him of the mortgage for its face, was not a trustee for the mortgagor, nor his creditors, as to the difference between what he paid for the mortgage and the sum which he received upon its sale. (*Grissler agt. Powers, ante*, 194.)

2. *Schaffer agt. Reilly* (50 *N. Y.*, 61) and *Freeman agt. Auld* (44 *id.*, 50) distinguished. (*Id.*)
3. An agreement was made between R. and S. that S. should pay a mortgage made by C., in consideration whereof R. agreed to cancel a mortgage he held, made by S. *Held*, that this agreement bound the assignee of the S. mortgage, who took the same from R. with knowledge thereof, as also the Broadway Bank, who afterwards received the mortgage from such assignees, as security for a debt, and that S., having paid the mortgage of C., was entitled to a satisfaction of his own mortgage in the hands of the bank. (*Seamons agt. Ruck, ante*, 317.)
4. *Ingraham agt. Disborough* (47 *N. Y.*, 431), *Cutts agt. Guild* (57 *id.*, 232) applied. (*Id.*)

See USURY.

Real Estate Trust Company agt. Rader, ante, 281.
Wheaton agt. Voorhis, ante, 319

MOTIONS AND ORDERS.

1. A motion at the close of the case to conform the pleadings to the proof can never be granted where the admission of the evidence has been promptly objected to upon the ground that the evidence did not tend to support the allegations in the answer. (*Wheaton agt. Voorhis, et al., ante*, 319.)

Chamber order of county judge—appeal from—can only be taken after order has been entered in

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the county clerk's office. (*See Pool agt. Safford*, 10 Hun, 497.)

Motion for a new trial, after interlocutory judgment — appeal need not be taken — Code, section 268. (*See Bennett agt. Austin*, 10 Hun, 451.)

Setting aside judgment — not granted on a second motion, after denial of motion for a new trial on the judge's minutes. (*See Knapp agt. Post*, 10 Hun, 35.)

To set off judgment — distinction between remedy by motion and action. (*See Prouty agt. Swift*, 10 Hun, 232.)

Moving party — right of, on motion, to read affidavits not served. (*See Jacobs agt. Miller*, 10 Hun, 230.)

2. The supreme court at special term has power to vacate an order confirming the report of commissioners appointed to appraise the compensation for lands sought to be taken for railroad purposes, and thereupon to set aside the report and to appoint new commissioners; the owner is not confined to the remedy by appeal to the general term given by the general railroad act (*Secs. 17, 18, chap. 140, Laws of 1850*). *In re Application of N. Y. C. and H. R. R. Co.*, 64 N. Y., 60.)

3. Where cause is shown for thus setting aside the proceedings, the court is the judge of the sufficiency thereof, and the granting such relief is within its discretion, the exercise whereof may be reviewed by the general term, but not in this court. (*Id.*)

4. The report of commissioners may be set aside for misconduct, palpable error or accident on the part of the commissioners, such as would authorize the setting aside of a verdict or the report of a referee; and what would authorize a special term to excuse a de-

fault of a party and to set aside an inquest or a dismissal of a complaint taken at a circuit, will empower it to vacate the order of confirmation. (*Id.*)

5. An order of reference, under section 222 of the code, to ascertain damages upon an undertaking given upon the granting of an injunction, cannot be regularly granted until judgment has been entered; but where the order is entered by plaintiff's consent this obviates the objection. (*Lawton agt. Green*, 64 N. Y., 326.)

6. The final order in such proceedings should be limited to fixing the amount of damages, and a provision therein requiring the plaintiff to pay the same is improper. The amount of damages so ascertained is conclusive upon the parties and the sureties, but payment can only be enforced by action upon the undertaking. (*Id.*)

7. A right to set off a judgment in favor of A. against B., against a judgment in favor of B. against A., cannot be asserted by motion on behalf of A., where it appears that before B.'s judgment was obtained he assigned his claim to a third person. If A. has any equities they can only be enforced by action, not by motion. (*Swift agt. Prouty*, 64 N. Y., 545.)

8. As to whether an order denying a motion to set off one judgment against another is reviewable here, *quære*. (*Id.*)

9. Under the provision of the mechanic's lien law of New York city of 1863 (*chap. 500, Laws of 1863*), providing for the continuance of a lien "by order of court," the order of any court having jurisdiction of such liens is sufficient. (*Darrow agt. Morgan*, 65 N. Y., 333.)

10. No notice of application for such an order is necessary, unless the

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court to which application is made requires it. (*Id.*)

11. It is not necessary to the validity of an order of referees, affirming upon appeal a decision of highway commissioners laying out a highway, that it should show that all of the referees met to deliberate on the subject-matter of the order or were notified so to do, and such order is not void, although signed by only two of the referees. (*People ex rel. Becker* agt. *Burton*, 65 N. Y., 453.)

12. If presence or notice to all the referees was required, a return by the referees upon appeal from their decision, signed by all the referees, stating that all were present at the hearing and when the decision was made, and deliberated thereon, is sufficient to sustain the order. (*Id.*)

13. An order granting, denying, continuing or setting aside a preliminary injunction is not reviewable in this court, and the court will not entertain an appeal therefrom for the purpose of determining the right of plaintiff to maintain the action. (*Calkin* agt. *Man. Oil Co.*, 65 N. Y., 557.)

14. In an action alleging a partnership between the parties (which was denied by the answer) and asking for an accounting, an order of reference was entered directing the referee, 1st. To hear, determine and report as to whether the partnership existed. 2d. Staying proceedings thereon to enable either party to move for a new trial at general term. 3d. If the referee found, or if upon the motion for a new trial it should be determined that a partnership existed, then that an accounting be taken by the referee. The referee reported that a partnership existed and directed an accounting. *Held*, that a motion at general term to set aside the report and for a new trial was proper, as was also an appeal to

this court from the order of general term granting a new trial. (*Johnson* agt. *Youngs*, 65 N. Y., 599.)

15. Where an order shows that the motion was granted upon questions of fact, every question of law and fact appearing in the record is open for review here. (*Id.*)

When motion, and not appeal, proper remedy to correct judgment. (*See Cole* agt. *Tyler*, 65 N. Y., 73.)

NEGLIGENCE.

1. The rule seems to be that causes of action for damages, such as are given by our statutes (*Laws* of 1847 and 1849) to the personal representative of a deceased person, whose death was caused by culpable negligence, are not recognized by the common law, and that statutes of any particular state giving such rights of action have no extra territorial jurisdiction. (*Stalknecht* agt. *Pennsylvania Railroad Company*, ante, 305.)
2. But causes of action of this character, arising under statutes of one state, may be enforced in another state, provided it is made to appear that the maintenance of such causes of action is in conformity with the policy of the state in which the action is brought, and are recognized by the laws of that state. (*Id.*)
3. Where the complaint sets forth the following facts, viz.: That defendant is a corporation of the state of Pennsylvania, and the owner of the Pennsylvania railroad, &c.; that plaintiff's intestate was in the employment of defendants, as brakeman on a freight train, at the time of the accident which caused his death; that the death was caused by negligence, &c., of defendants, and without any fault of plaintiff's intestate;

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that the collision occurred in the state of New Jersey; then sets out a statute of the state of New Jersey, and alleges that it was part of the law of New Jersey, at the time of the occurrence of the grievances complained of by plaintiff, and under which plaintiff claims the right to recover in this action; that plaintiff was duly appointed administratrix, &c., and that her intestate left surviving the plaintiff, his widow, and three minor children, who were dependent upon him for support, and sustained pecuniary injury by his death to plaintiff's damage, naming the amount:

Held, on demurrer to the complaint, that it appears, from the allegations in the complaint, that the act of New Jersey is in entire consonance with the policy of the state of New York, as declared by its acts of 1847 and 1849, and that the complaint stated facts sufficient to constitute a cause of action. (*Id.*)

NEWLY-DISCOVERED EVIDENCE.

1. A new trial will not be granted on the ground of *newly-discovered evidence* where the evidence claimed to be newly discovered is cumulative, evidence of a similar character having been introduced upon the trial. (*Gale* agt. *New York Central and Hudson River Railroad Co.*, ante, 385.)

NEW TRIAL.

1. In actions for *personal injuries* the court will not grant a new trial on the ground of *excessive damages*, unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from passion, prejudice, partiality or corruption. (*Gale* agt. *New York Central and*

Hudson River Railroad Co., ante 385.)

2. It is not enough to say that, in the opinion of the court, the damages are too high, and that it would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for *personal torts or injuries*. (*Id.*)
3. Although there are cases in which the court has sometimes *reduced verdicts* where the damages were excessive, it would seem to be a doubtful practice in actions for personal injuries. A jury, and a jury only, under the laws of our state, unless otherwise agreed upon by the parties, is the body to whom the duty of assessing damages in actions of this character is confided, and the law which enables a judge to fix and limit a recovery *after verdict* would seem to apply equally as well to a case *before verdict*. (*Id.*)
4. The better practice would seem to be, where the verdict is so excessive as to justify the conclusion that it is the result of partiality, prejudice or corruption, to set it aside and order a new trial, and thus allow a new jury to assess the damages. (*Id.*)
5. A new trial will not be granted on the ground of *newly discovered evidence* where the evidence claimed to be newly discovered is cumulative, evidence of a similar character having been introduced upon the trial. (*Id.*)
6. The alleged declarations of jurors as to the grounds of their verdict, cannot be received to impeach it. The affidavits of the jurors themselves could not be received for that purpose, and much less their unsworn statements made to a third person. (*Id.*)
7. If the prevailing party to an action, with a view of influencing

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a juror by placing him under obligations to him, seeks and obtains an opportunity so to do, a new trial will be granted. In such case the court could see that an effort had been made to improperly influence, and it would not stop to inquire whether the attempt had or had not been successful, but would assume that the party had, or at least partly succeeded in that which he had attempted. (*Id.*)

8. When, however, the court is satisfied that there has been no attempt by the successful party to unduly influence a juror, either by conversation or by placing him under obligations, and that his action has not in fact been improperly influenced, then, even though the act may have been indiscreet, the court will not disturb the verdict. (*Id.*)

9. On a Friday during the progress of the trial, the jury having been discharged till the following Monday, one of the jurors, being about twelve miles from home and having failed to obtain any other equally comfortable opportunity to reach his residence, asked the plaintiff, who had to go for a number of miles in the same direction, for permission to ride with him. To this the plaintiff consented. It was abundantly shown that nothing whatever concerning the cause upon trial was spoken of or discussed, nor were any words exchanged between the juror and the plaintiff, except when the juror left the sleigh at the point where their routes homeward diverged, the juror thanked the plaintiff for kindness. Before the close of the trial the juror reported what he had done to the court, and the fact was known to the defendant's counsel, who made no objection to the juror for this reason. On motion to set aside the verdict for this cause:

Held, that the act done was not an officious one thrust by the pre-

vailing party upon the juror for the purpose of procuring his good will and thus influencing action, but it was the result of neighborly courtesy and kindness, without any evil intent whatever, and is no ground for disturbing the verdict.

Held, also, that the fact that the juror rode home with the plaintiff being known to the defendant's counsel before the close of the trial, whilst the defendant would not, perhaps, be precluded from raising any objection founded upon any improper attempt to influence, which was then unknown, yet the objection, based upon the mere ride with the plaintiff, because not then made, must be deemed to have been waived. (*Id.*)

10. An allowance to the plaintiff of two and one-half per cent for costs on the verdict of \$14,000 deemed sufficient under the circumstances of the case. (*Id.*)

See DIVORCE.

Harding agt. *Harding*, ante, 238.

11. After a motion for a new trial has been made upon the minutes of the justice before whom the action was tried, and by him denied, it is error for another justice to entertain and grant another motion to set aside the judgment on the ground of "error and manifest injustice," a new trial can only be granted in such a case on appeal from the first order. (*Knapp* agt. *Post*, 10 *Hun*, 35.)

Motion for, after interlocutory judgment—appeal need not be taken—Code, section 288. (*See Bennett* agt. *Austin*, 10 *Hun*, 451.)

12. In an action to recover damages for breach of contract, where plaintiff has recovered judgment allowing one item of damage claimed and rejecting another, he cannot retain the amount allowed and ask upon appeal for a retrial as to the item rejected; if a reversal and

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new trial is granted, it must be of the entire judgment and claim. (*Wolstenholme* agt. *W. F. M. Co.*, 64 *N. Y.*, 272.)

NON-RESIDENT.

1. In this action, brought by the plaintiffs, who were non-residents, to enforce an attachment, issued in another action in which they had recovered judgment, they gave to the sheriff the bond of indemnity required by section 238 of the Code. *Held*, that they were not thereby relieved from giving security for costs, as required by part 3, chapter 10, title 2, section 1, of the Revised Statutes. (*Hodges* agt. *Porter*, 10 *Hun*, 244.)

NONSUIT.

1. As to whether, when a motion for a nonsuit is made and granted upon an untenable ground, a good ground which might have been obviated had it been presented by further proof, can be availed of on appeal to sustain the decision, *quære*. (*Beckwith* agt. *Whalen*, 65 *N. Y.*, 322.)

NOTICE.

1. One who seeks to establish a right in hostility to a recorded title to or security upon land, under and by virtue of a prior unrecorded conveyance or prior equities, must show actual notice to the subsequent purchaser of his rights, or prove circumstances such as would put a prudent man upon his guard and from which actual notice may be inferred and found. (*Brown* agt. *Volkering*, 64 *N. Y.*, 76.)
2. The possession which will be equivalent to actual notice to a subsequent purchaser must be an actual, open and visible occupation, inconsistent with the title of

the apparent owner by the record, not equivocal, occasional or for a special or temporary purpose. Constructive possession will not suffice. (*Id.*)

3. The principle of constructive notice will not apply to an uninhabited and unfinished dwelling-house (*FOLGER, J., dissents*). (*Id.*)
4. One F. transferred to plaintiff by deed in trust, among other things, a demand against defendant for money loaned. F. subsequently brought suit against plaintiff to set aside the trust, in which action defendant was sworn as a witness. Plaintiff succeeded in the litigation. In an action upon the claim defendant proved payment to F. Plaintiff requested the court to charge that the pendency of said action brought by F. was constructive notice to defendant of the existence of the trust deed. The court refused so to charge. *Held*, no error; that whether defendant had notice of the character of the action sufficient to put him upon inquiry was a question of fact for the jury. (*Heermans* agt. *Ellsworth*, 64 *N. Y.*, 159.)
5. No notice of judgment, execution and return is necessary to be given before suit is brought upon an undertaking on appeal. (*Humer-ton* agt. *Hoy*, 65 *N. Y.*, 380.)
6. *It seems*, that on appeal from the determination of commissioners of highways laying out a highway no notice of the time and place of hearing the appeal before referees is required to be given to the owner or occupants of the lands to be taken. The only notice required to be given is to the commissioners and to one or more applicants for the road (1 *R. S.*, 518, sec. 87). (*People ex rel. Becker* agt. *Burton*, 65 *N. Y.*, 452.)
7. An owner who appears and is heard before the referees without objecting to their jurisdiction be-

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cause of omission to serve notice upon him, cannot raise the objection on appeal from the decision of the referees. (*Id.*)

NOTICE OF SUIT PENDING.

1. The filing of a notice of suit pending, and the levy, by virtue of an attachment upon real estate formerly owned by the defendant but sold and conveyed, to the knowledge of the plaintiff, prior to the filing and levy, does not defeat the title of the purchaser, if regular in all respects, save that his conveyance is not recorded; nor is such title subordinated to the lien of the attachment. (*Lamont agt. Chelsea, 65 N. Y., 30.*)

2. The provision of the Code (*sec. 183*), providing for the filing of *lis pendens*, making it constructive notice to a purchaser, and declaring that a purchaser whose conveyance is subsequently executed or recorded shall be a subsequent purchaser and shall be bound by the proceedings, simply affects such purchaser "to the same extent as if he were made a party" to the action; and the title of a purchaser so holding under a prior unrecorded conveyance, if made a party, could not, under such circumstances, be affected when plaintiff, at the time of filing notice, had actual or constructive notice of his rights. (*Id.*)

3. Under an execution, issued in an action wherein notice had been filed and attachment issued and levied as aforesaid, the sheriff sold and subsequently conveyed all the estate in the premises of which the judgment debtor was seized and possessed on the day judgment was perfected. In an action of ejectment by one claiming under the sheriff's deed, *held*, that as prior to that day the judgment debtor had conveyed and then had no estate, nothing was conveyed by the sheriff's deed. (*Id.*)

OFFER.

1. After issue had been joined in this action, and on the seventh of February, an order to allow judgment to be taken against him was served by the defendant; on the ninth of February the cause was regularly called in its order on the calendar, an inquest taken therein, and the costs accruing subsequent to the offer taxed in plaintiff's favor. *Held*, that, as ten days had not elapsed from the service of the offer of judgment to the time of trial, the plaintiff was entitled to disregard the offer and to tax the costs thereafter accruing. (*Herman agt. Lyons, 10 Hun, 111.*)

PAROL EVIDENCE.

1. Parol evidence is admissible, to show what took place at the time, when the answers were filled out to the written interrogations put to the insured on his application for a life policy, when such answers are ambiguous. (*Higgins agt. Phoenix Mut. Life Ins. Co., 10 Hun, 459.*)

Admissible to show the time of the execution and delivery of a paper, offered in evidence for the purpose of taking a case out of the statute of limitations. (*See Kincaid agt. Archibald, 10 Hun, 9.*)

PARTIES.

1. Where the complaint alleged that there were "other individuals comprising the firm of J. B. Lippincott & Company" besides the two persons made defendant, *held*, that the other partners are necessary parties, and that to render the omission to make them parties available on demurrer, the defect appearing on the face of the complaint, it was not necessary that it should also appear that the other parties were living. (*Green agt. Lippincott, ante, 33.*)

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2. Where a contractor had failed to perform his contract for the removal of "night soil," and the board of health passed a resolution and acted thereunder, directing its immediate removal:

Held, that the board of health, under the fifth section of chapter 636 of Laws of 1874, was a necessary party to an action by the contractor against the city of New York. (*Bell* agt. *The Mayor, &c.*, *ante*, 334.)

3. In an action to reform and revoke a deed of trust all the beneficiaries named in the deed are necessary parties. (*Conklin* agt. *Davies*, *ante*, 409.)

4. They are entitled to be heard upon the question as to whether the deed should have contained a power of revocation. (*Id.*)

See ANSWER.

Astie agt. *Leeming*, *ante*, 397.

5. An assignee for the benefit of creditors of an insolvent copartnership, the representatives of a deceased partner, and the surviving partners may properly be joined as parties defendant, and an action may properly be brought against them by a creditor of the firm, to compel the assignee to account and pay over to plaintiff his share of the proceeds of the partnership property, and (it being alleged in the complaint that the surviving partners are insolvent) to recover of the representatives the balance of plaintiff's claim (*ALLEN and EARL, JJ., dissenting*). (*Haines* agt. *Hollister*, 64 N. Y., 1.)

6. *It seems*, it is not necessary in such an action that the other creditors should be made parties, or that the action should be brought in their behalf. (*Id.*)

7. Even if it were necessary, when it does not appear upon the face of the complaint that there are

other creditors, this is not a good ground for demurrer. (*Id.*)

8. One asserting a right under a mortgage prior to the mortgage, is a proper party to an action for foreclosure of the mortgage and the question of priority is proper to be determined in the action. (*Brown* agt. *Volkering*, 64 N. Y., 76.)

9. Under section 391 of the code, a plaintiff in an action pending may examine the adverse party on oath before service of the complaint, and for the purpose of obtaining facts on which to frame the complaint. (*Glenney* agt. *Stedwell*, 64 N. Y., 120.)

10. If the affidavit presented to a judge for the purpose of procuring an order for such examination, discloses a case giving the judge power to act, his action is discretionary and cannot be reviewed here. (*Id.*)

11. The effect of said provision cannot be altered by a rule of the court. (*Id.*)

12. Where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this, although his act alone might not have caused the entire injury, and although without fault on his part, the same damage would have resulted from the act of the other. (*Slater* agt. *Mersereau*, 64 N. Y., 188.)

13. Where the owner of a mortgage has pledged the same as collateral security for a debt less than the face of the mortgage, he has an interest in the same which entitles him to bring an action for the foreclosure of the mortgage. In such action the pledgee is a neces-

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sary party, but it is immaterial as far as the mortgagor or other parties in interest are concerned whether he is made a plaintiff or defendant. (*Sinason* agt. *Satterlee*, 64 N. Y., 657.)

14. Where insurance is effected by an agent for a principal known to the insurer but not named in the policy, the agent become a trustee of an express trust, within the meaning of section 113 of the Code, and an action may be brought upon the policy, either in the name of the principal or agent (*LOTT, Ch. C., and EARL, C., dissenting*). (*Pitney* agt. *G. F. Ins. Co.*, 65 N. Y., 6.)

15. A party to an action is not prohibited by section 399 of the Code from testifying to a transaction or communication between himself and a deceased agent of the opposite party. (*Hildebrandt* agt. *Crawford*, 65 N. Y., 107.)

16. He may testify also to a conversation, heard by him, between a principal and agent, both deceased, as against a successor in interest of the principal. (*Id.*)

17. By statute (*chap. 257, Laws of 1870*) the then trustees (who are named) of defendant, a religious corporation, were authorized to make disposition of a fund belonging to the corporation, for other than corporate purposes. This action was brought to restrain such disposition, the complaint alleging the act to be unconstitutional, and that the trustees named intended and were proceeding to make such disposition of the fund; there was no allegation that the corporation itself contemplated any action. *Held*, that the exercise of the power was conferred by the act upon the trustees as individuals, and no cause of action was set forth against defendant; that to enable the court to pass upon the constitutionality of the act, the

persons claiming to exercise authority under it should be made parties. (*Davis* agt. *The Trustees, &c.*, 65 N. Y., 278.)

PARTITION.

1. A judgment in an action for partition of lands held by partners as tenants in common, which directs a partition by commissioners, and charges a mortgage held by one of the partners covering the undivided interest of his copartner upon the separate share of the latter, is not, where no division has already been made, a bar to an action for the foreclosure of the mortgage. (*Reid* agt. *Gardner*, 65 N. Y., 578.)

PARTNERSHIP.

1. An agreement between parties to share in the profits which might arise out of the purchase of real estate, is sufficient to constitute a partnership as to third persons, no matter what they may be *inter sese*. (*Williams et al.* agt. *Gillies, et al.*, *ante*, 429.)
2. There may be a copartnership in real estate, and it is not necessary to the existence of such partnership that it be evidenced by a written agreement signed by the partners; but it may be created by parol. (*Id.*)
3. Where the ostensible partner is alone known in the transaction, all persons are held responsible as partners to third persons who are to share in the profits. (*Id.*)
4. It is no defense to an action that a smaller claim than the party is entitled to is made in the complaint. (*Id.*)
5. Defendant D. made a contract with F. for the purchase of the land in question. It was agreed

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between R., the defendant D. and the defendant G., that the property should be bought for their joint benefit; R. contributing one-half, D. one-quarter and G. one-quarter. It was further understood that D. should take the title and give back the mortgage. The parties each contributed their proportionate share of the purchase-money, and as long as interest was paid upon the mortgage, each paid his proportionate share of such interest:

Held, that R., G. and D. were copartners in the transaction, and all were liable for the debt created in that enterprise. (*Id.*)

6. An assignee for the benefit of creditors of an insolvent copartnership, the representatives of a deceased partner, and the surviving partners may properly be joined as parties defendant, and an action may properly be brought against them by a creditor of the firm, to compel the assignee to account and pay over to plaintiff his share of the proceeds of the partnership property, and (it being alleged in the complaint that the surviving partners are insolvent) to recover of the representatives the balance of plaintiff's claim (ALLEN and EARL, *JJ.*, *dissenting*). (*Haines* agt. *Hollister*, 64 N. Y., 1.)
7. It seems, it is not necessary in such an action that the other creditors should be made parties, or that the action should be brought in their behalf. (*Id.*)
8. Even if it were necessary when it does not appear upon the face of the complaint that there are other creditors, this is not a good ground for demurrer. (*Id.*)
9. Where one engaged in business enters into a copartnership with another for the purpose of continuing the business, and transfers its assets to the firm in consideration of an agreement of the firm to assume and pay certain speci-

fied debts incurred in the business, and to apply the assets first to the payment of said debts, the agreement is to be deemed as made for the benefit of the creditors holding the claims specified, and an action may be maintained by such a creditor against the firm upon such agreement. (*Arnold* agt. *Nichols*, 64 N. Y., 117.)

10. An allegation in such an action, in the answer of the partner, that he was induced to enter into the agreement by the fraud of the original debtor in the absence of allegations that he has rescinded the agreement on account of the fraud, or has sustained damages by reason thereof, does not authorize evidence of the fraud upon the trial. (*Id.*)
11. One who purchases the interest of a partner in a firm acquires simply a right to an accounting in respect to the partnership effects and to a share of the surplus remaining after payment of the partnership debts, deducting any balance that may be due from the vendor to his copartners upon an accounting. (*Morse* agt. *Gleason*, 64 N. Y., 204.)
12. Where a member of a firm transfers his interest therein to a third person, who is received into the firm as a partner in his stead, he thereafter occupies the position simply of surety for the firm debts to the extent that the assets of the firm are sufficient for their payment. Such assets are held by the new firm, charged with a trust for the payment of the debts of the old firm. (*Id.*)
13. Real estate purchased for and appropriated to partnership purposes and paid for out of partnership funds is partnership property, although the legal title is taken in the name of one of the partners; equity will hold him as trustee for the firm. (*Fairchild* agt. *Fairchild*, 64 N. Y., 471.)

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14. There is no distinction in respect to the proof necessary to establish the fact that the real estate is partnership property between such a case and the case of a conveyance to the several partners; it may be established in either case by parol evidence. (*Id.*)
15. The fact that in the firm accounts the land is treated the same as other firm property as to purchase-money, income, expenses, etc., is a controlling circumstance in determining the intent, and from it an agreement may be inferred. (*Id.*)
16. For the purpose of paying debts and adjusting the equities between the copartners real estate belonging to a partnership is treated as personal property, and what remains is regarded as real estate descending to the heirs of the partners, according to their several interests. (*Id.*)
17. The same evidence, however, which will establish its character as partnership property for the purpose of paying the debts and adjusting the equities, will determine it for the purpose of final division. (*Id.*)
18. In order to establish payment of money out of partnership funds upon claims against real estate so deeded to one of the members, evidence that mortgages have been so paid is competent without production of the mortgages; they are to be regarded simply as collateral to the principal fact. (*Id.*)
2. An action for such balance cannot be connected with an action for "*an accounting*," unless there be in the complaint appropriate allegations. (*Id.*)
3. The court is justified in looking at the prayer for relief in order to ascertain the plaintiff's view of his own cause of action. (*Id.*)

PARTY WALL.

1. On December 15, 1873, the defendant, being the owner of four first-class dwelling-houses and lots on Fifth avenue, immediately north of Forty-fourth street, in the city of New York, conveyed, by warranty-deed, to plaintiff, the third dwelling and lot north of Forty-fourth street. The lot thus conveyed was thirty feet in width on Fifth avenue and one hundred feet in depth, and the dwelling thereon was thirty feet wide and sixty feet deep. The southerly line of the plaintiff was the center of a party wall between the buildings of plaintiff and defendant. All four of the dwellings were first-class private residences, and plaintiff was assured by defendant that they would so remain, which assurance was one of the inducements which influenced the purchase. The title under which the defendant holds his property forbids the erection thereon of "a tenement-house." In 1875, defendant remodeled the interior of his two dwellings immediately south of that belonging to plaintiff, and converted them into an establishment known as a French flat or an apartment-house. He also extended his building in the rear to the depth of his lot and erected his wall, which was an extension of the old party wall, several inches upon the property of the plaintiff. He now proposes to erect two additional stories upon his two dwellings, in which erection, by adding to the height of the party wall, he really occupies

PARTNERS.

1. In an action between partners, in order to justify a recovery in favor of the plaintiff for any "*specific sum*" there should have been a balance struck, or agreed upon, as due from the defendant to the plaintiff. (*Covert agt. Henneberger, ante, 1.*)

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and builds upon the land of plaintiff, removing the chimneys of her dwelling and otherwise interfering with her property.

Held, that the completion of the buildings as dwellings, the erection of the party wall between them in a finished state, and the positive declarations of defendant made to plaintiff at the time of the purchase, all show that the party wall, as it existed at the time of the conveyance to the plaintiff, was to be the completed wall between the two buildings. As there is nothing from which any agreement or right to add to the party wall can be inferred, and as all acts and promises point to an opposite one, the injunction asked for must be granted. (*Musgrave agt. Sherwood, ante*, 811.)

PAYMENT.

1. It is the duty of an assignee of a non-negotiable chose in action, in order to protect himself against a payment by the debtor to the original creditor, to notify the former of the assignment; and in an action upon the demand where such a payment is established, the burden of proving notice prior to payment is upon the plaintiff. (*Heermans agt. Ellsworth*, 64 N. Y., 159.)

2. Defendant made his promissory note for the accommodation of the firm of Lambert & Lincoln, who procured it to be discounted and the proceeds were passed to their credit. Before the note matured Lincoln wrote to plaintiff to take up the note and to furnish money for that purpose. Plaintiff sent the money to Lincoln, who placed it in bank to his individual credit, and on the day the note fell due took up the note with his individual check. He did not assume to act for plaintiff or ask to have the note transferred to any one. He asked to have the note protested so that he could hold

the indorser and maker after protest. He sent the note to plaintiff. In an action upon the note, *held*, that plaintiff did not take title from the bank but from Lincoln, and subject to any defense against it in the hands of the latter; that the bank could not be made a seller without its knowledge or consent, and did not transfer the note but only took payment; and that plaintiff could not recover. (*Lancey agt. Clark*, 64 N. Y., 209.)

3. Plaintiff's complaint alleged, in substance, that certain bonds belonging to the estate of S., of whose will he was surviving executor, came into defendant's hands as the personal representative of M., a deceased executor, which they refused to deliver up unless plaintiff would pay an unjust claim for commissions, which was disputed by plaintiff, but which he paid in order to obtain the bonds. Defendant's answer, alleged, among other things, that an account containing charges for the commissions claimed was delivered to plaintiff at his request, examined by him and admitted to be correct. This allegation, after plaintiff had given evidence that he had always disputed the claim, defendants offered to prove on trial. The offer was rejected:

Held, error; that the averment in the complaint that the claim was unjust and was disputed was necessary in order to show that the payment was involuntary; and it being put in issue, defendant was entitled to the evidence offered as relevant to that issue. (*Scholey agt. Mumford*, 64 N. Y., 521.)

PLACE OF TRIAL.

1. In an action against the sheriff and attaching creditors, praying that they be compelled to determine their conflicting claims to property attached, *held*, upon the application of the sheriff, that he was entitled, under section 124 of

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the Code, to have the place of trial changed in this county. (*Wingjen* agt. *Verges*, 10 *Hun*, 576.)

PLEADINGS.

1. The object of a bill of particulars is but to fairly apprise the party calling for it of the nature of the claim against him, and where the claim is fairly disclosed no further specification is necessary. (*Bangs* agt. *Ocean National Bank*, ante, 351.)
2. The rule, as established by the Code of 1848 as to pleading, only required it to state the facts in ordinary and concise language, without repetition, "and in such manner as to enable a person of common understanding to know what was intended." (*Id.*)
3. It now, by the amendment of 1851, only requires a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition. The spirit and intent of the original enactment has not been changed, and all available rights in this respect is rather the subject of a bill of particulars than of a motion "to make a pleading more definite and certain." (*Id.*)
4. *It seems*, a motion to strike out matter in an answer as irrelevant and redundant should be granted where the whole is but matter of evidence, and cannot be regarded as any approach to a matter of pleading. (*Id.*)
5. To an action for rent the defendant set up, by way of counter-claim, damages arising from the erection of buildings on an adjoining lot, the intention of the adjoining owner to build being, as alleged, fraudulently concealed at the time the relation of landlord and tenant was created:

Held, on demurrer, that the counter-claim was insufficient. Building is not necessarily injurious to

adjoining occupant. (*Brown* agt. *Curran*, ante, 308.)

6. One H. having been arrested, in an action brought by the plaintiffs, to recover the possession of certain personal property an undertaking was given by said H. and F. and D, by which they bound themselves that the said H. should, at all times, render himself amenable to process, etc., and for the payment to the plaintiffs of such sum as might be recovered against him. Afterwards another undertaking was given by D. and J. in the form and to the effect required by section 211 of the Code. Plaintiffs having recovered judgment in said action, and an execution issued thereon having been returned unsatisfied, brought an action against all the sureties to both undertakings. *Held*, that a demurrer, interposed by the defendants on the ground of an improper joinder of separate causes of action, was proper and should be allowed. (*Cook* agt. *Horwitz*, 10 *Hun*, 586.)
7. A plea of usury must set forth the usurious agreement, the names of the parties between whom it was made, the amount loaned, the amount of usury agreed to be paid, the length of time for which the loan was agreed to be made and that the agreement was corrupt. An answer which fails to allege any agreement between the parties, but merely alleges that the plaintiff took and reserved more than seven per cent without, so far as appears, the consent of the borrower is fatally defective. (*National Bank of Auburn* agt. *Lewis*, 10 *Hun*, 468.)
8. A cause of action for a false imprisonment and a cause of action for a malicious prosecution, when both arise out of one and the same transaction, may be respectively alleged in different counts of the complaint. (*Barr* agt. *Shaw*, 10 *Hun*, 590.)

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9. In an action against the maker and payee of a promissory note indorsed in blank, where the answer alleged that the plaintiff was not the owner and holder of the note, or the real party in interest, but some one else was, *held*, that, as these facts if proven would constitute no defense to the action, proof thereof was properly rejected. (*Hays* agt. *Southgate*, 10 *Hun*, 511.)
10. In an action against a married woman on a promissory note, the special facts establishing her liability as a married woman need not be alleged in the complaint. (*Willsey* agt. *Hutchins*, 10 *Hun*, 502.)
11. Where a complaint contains, in one count, two causes of action, which cannot be properly united in the same action, the omission to state them in separate counts does not deprive defendant of his right to demur. (*Wiles* agt. *Suydam*, 64 *N. Y.*, 173.)
12. A complaint setting forth facts sufficient and seeking to charge defendant as a stockholder of a manufacturing corporation, organized under the general laws (*chap. 40, Laws of 1848*), with a debt of the corporation, because of a failure to make and record the certificate required by said act (*sec. 10*), and also alleging the requisite facts, and seeking to charge him, as trustee, with the debt, because of failure to file an annual report (*sec. 12*), contains two separate and distinct causes of action which cannot properly be united. (*Id.*)
13. The first cause of action is one upon contract, the second is an action upon a statute for a penalty or forfeiture. (*Id.*)
14. The two causes of action do not arise out of the same transaction or transactions connected with the same subject of action, within the meaning of section 167 of the Code. (*Id.*)
15. A plea in abatement to an indictment is to be strictly construed; it must be drawn with precision and accuracy, and must be certain to every intent. (*Dolan* agt. *The People*, 64 *N. Y.*, 485.)
16. A plea in abatement to an indictment found at a court of general sessions in the city of New York alleging that the annual grand jury list was not wholly selected, as required by statute (*chap. 493, Laws of 1853*), from the petit jury lists made out by the commissioner of jurors, without any averments of fraud or design, is not good. The fact that a few names not appearing on the petit jury lists are accidentally put upon the grand jury lists does not vitiate the whole list, and that it was by accident or oversight is to be presumed in the absence of allegations of fraud or design. (*Id.*)
17. Nor is it a good plea that some one of the fifty selected as the special panel of grand jurors (*sec. 28, chap. 589, Laws of 1870*), was not upon the petit jury lists, in the absence of an allegation that the persons actually sworn and impaneled were not upon that list. It is necessary, also, in such a plea, to give the names of the persons alleged to have been selected and drawn who were not upon the petit jury lists. (*Id.*)
18. It is not a good plea that the commissioner of jurors was prevented by duress from attending upon or supervising the grand jury. In the absence of allegations as to how the grand jury was drawn and by whom, it is to be presumed that the drawing was made by some other person claiming the office, acting as *de facto* commissioner, and recognized as such by all the officers having relations with him or his work; and a jury drawn by a *de facto* commissioner is regular. (*Id.*)
19. It is within the discretion of the court of original jurisdiction

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whether, upon overruling a demurrer by defendant, he shall be allowed to answer over. (*Simson* agt. *Satterlee*, 64 N. Y., 657.)

When variance immaterial. (*See Place* agt. *Minster*, 65 N. Y., 89.)

Facts proper to be proved found in action for fraud, although not alleged in complaint. (*See Oliver* agt. *Bennett* [*Mem.*], 65 N. Y., 559.)

When party sues to recover real estate as assignee of lease he can recover, although it appears he has purchased premises of lessor. (*See Bowman* agt. *Keleman* [*Mem.*], 65 N. Y., 598.)

POLICE JUSTICE.

1. The statute which defines the course of proceedings before a police magistrate or other officer authorized to issue a warrant for the arrest and apprehension of criminal offenders (3 R. S. [5th ed.], page 993, &c.), is mandatory in all its requirements. A duty is thereby devolved upon the officer who issues the warrant, which he must discharge. (*Matter of Gessner*, ante, 515.)

2. When the prisoner is brought before the magistrate by the warrant which he issues upon a proper complaint and supported by evidence, he is *commanded* (the word used in the statute is "shall") to "proceed, as soon as may be, to examine the complainant and the witnesses produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate shall deem pertinent." The magistrate *must* reach a conclusion whether there is or is not probable cause for charging the prisoner with the crime. (*Id.*)

3. A bill of indictment found by a grand jury against a prisoner after

an examination has been commenced before a magistrate authorized to issue a warrant of arrest, is expressly declared to be a *superseats* of the powers and duties of the magistrate, and it is not so inconsistent with a continuance thereof and so to operate by necessary implication, nor can a warrant issued upon it take the prisoner from the jurisdiction of such magistrate until his statute duties have been fulfilled. (*Id.*)

4. The power to admit a prisoner to bail pending an examination before a police justice is, by the act of 1876 (chapter 21), conferred upon the magistrate before whom the proceedings are being held. (*Id.*)

PRACTICE.

See DIVORCE.

Harding agt. *Harding*, ante, 23.

See JUDICIAL SALE.

People agt. *Bond Street Savings Bank*, ante, 336.

See STREETS IN CITY OF UTICA.

Matter of Schreiber, ante, 359.

See EXECUTORS AND ADMINISTRATORS.

Matter of Hahlin, ante, 501.

See POLICE JUSTICE.

Matter of Gessner, ante, 515.

1. Upon the hearing of a motion made by the plaintiff for the continuance of a temporary injunction, granted in the action, he will not generally be allowed to read additional affidavits, which are not in answer to new matter introduced by the defendant, but merely corroborative of the facts set forth in the moving papers. (*Jacobs* agt. *Miller*, 10 Hun, 230.)

2. Where an order is entered discontinuing an action on payment of costs, the defendant may, so long as the costs are unpaid, enter

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- judgment therefor and issue execution thereon, or he may disregard the order and proceed with the action as though it had never been entered. (*Sutphen agt. Lash*, 10 Hun, 120.)
3. Upon the arraignment of the plaintiff in error upon an indictment in which he was named "John Barnesciotta, otherwise called Garibaldi," his counsel filed the following plea: "Now comes the defendant, Barnesciotta, and pleads to the indictment that he is not now, and never was, known by the name of Garibaldi, which he verifies," to which plea the people demurred. *Held*, (1) that a demurrer was the proper mode of disposing of the plea; (2) that the plea was properly overruled, as the true name preceded the *alias dictus*. (*Barnesciotta agt. People*, 10 Hun, 137.)
 4. A court of equity will not restrain by injunction a court-martial from trying one subject to its jurisdiction when he alleges as the only ground for such injunction that he has already been tried upon the same charge, and that he apprehends that the second trial will be unfairly conducted. (*Perault agt. Rand*, 10 Hun, 222.)
 5. After the entry of an interlocutory judgment or decree, not authorizing a final judgment, but directing further proceedings before a referee or otherwise, a motion for a new trial, on a case and exceptions, may be made under section 268 of the Code, without taking any appeal from such judgment or decree.
Semble, such motion cannot be made in case of a trial before a referee.
 Such motion does not stay proceedings under the interlocutory judgment or decree. (*Bennett agt. Austin*, 10 Hun, 451.)
 6. When, in an action of ejectment, it appears from the complaint that the plaintiff claims to recover the value of the rents and profits of the premises during the time they have been unlawfully withheld by the defendant, it is too late, on the trial, to object to the form and want of particularity and certainty with which the allegations relating thereto are made. (*Candee agt. Burke*, 10 Hun, 350.)
 7. One who is in possession of real property, claiming title thereto, is possessed of a sufficient estate therein to maintain proceedings under the Revised Statutes to determine conflicting claims thereto. (*Schroder agt. Gurney*, 10 Hun, 418.)
 8. Courts of equity will generally give relief under a bill *quia timet*, only where it is necessary to resort to extrinsic evidence not of record, to show the invalidity of the instrument constituting the apparent cloud upon the title. (*Id.*)
- After service of an offer to allow judgment to be taken, but before the expiration of ten days from such service, on the cause being reached on the calendar, plaintiff can disregard such offer, try the cause and tax the costs thereafter accruing. (*See Herman agt. Lyons*, 10 Hun, 111.)
9. An order quashing a writ of *habeas corpus* can only be reviewed upon appeal. A writ of error will not lie in such case. (*People ex. rel. agt. Conner*, 64 N. Y., 451.)
 10. Where, upon the return of an order to show cause why a mandamus should not issue, the relator takes no issue upon the allegations of the affidavits and papers presented by defendant, but proceeds to argument and asks for a peremptory writ; this is equivalent to a demurrer, *i. e.*, it is an admission of the truth of those allegations, as statements of facts, but a denial of their sufficiency in law to prevent the issuing of the writ,

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and if the papers set forth facts showing the relator not entitled to the relief sought, the writ cannot be granted. (*People ex rel. Tenth Nat. Bank agt. Board Apportionment*, 64 N. Y., 627.)

11. Where a party has a remedy by action, relief by mandamus will be denied. (*Id.*)
12. A defendant in an action under the Code to determine claims to real property, who claims no interest in the property, in order to save himself from liability must appear and disclaim. When this is done the burden of establishing the fact of his making a claim is upon the plaintiff, and in the absence of evidence showing this a judgment against the disclaiming defendant is error. (*Davis agt. Read*, 65 N. Y., 586.)

PRINCIPAL AND AGENT.

1. Although under section 399 of the Code, a party to an action may testify as to a conversation between the deceased and a third person which he has overheard, so long as such testimony is limited to what was neither a personal transaction nor communication between the witness and the deceased, yet this rule does not prevail when such third person is an agent for, and is acting in the interest of the witness. (*Head agt. Teeter*, 10 Hun, 548.)

PROOF OF SERVICE.

1. The certificate of the constable, showing a service of the summons upon the defendant personally, by showing the original and delivering a copy thereof to him, is "due proof" of the service thereof. (*People ex rel. Hughes agt. Lamb*, 10 Hun, 348.)

PROMISSORY NOTE.

1. Where a promissory note, signed and dated in New York and payable at a bank here, is negotiated for the first time in another state, the laws of the state where the note is negotiated are to control as to the defense of usury. (*Dickinson agt. Edwards*, ante, 40.)
2. The form of the note or obligation may be written here, but it only becomes a note or contract upon its delivery, and it is made when and where it is delivered. (*Id.*)
3. A. made his promissory note, dated in New York and payable at a bank here, and delivered the same to B. who took the note to the state of Massachusetts where it was for the first time negotiated, C. discounting it at a rate of interest lawful there, but more than allowed by the laws of this state. In an action by C. against A. on the note:
Held, that it was not void for usury, as the laws of Massachusetts must govern as to this question. (*Id.*)
4. One who indorses his name on a *non-negotiable promissory note*, before its delivery by the maker to the payee, is, in effect, himself a maker of the note; and his name, equally with that of the maker who subscribes it, imports an absolute liability for its payment at maturity. (*Paine agt. Noelke*, ante, 273.)
5. Where it appears from the complaint that one of the two defendants made the note in suit in favor, but not to the order, of the plaintiff, the payee therein named, that the other defendant indorsed it, and that it was thereupon delivered to the plaintiff:
Held, that these averments, taken together, must be deemed equivalent to an allegation that the two defendants made the

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promissory note, and that both are jointly liable as makers thereof. (*Id.*)

6. Although not negotiable, the instrument is a promissory note, and, as such, imports a consideration, though none is expressed. Want of consideration is matter of defense. (*Id.*)

7. The defendants, H. and M., made their promissory note to their own order for \$1,571.39, and indorsed the same to the defendant K., who before its maturity, indorsed and delivered it to plaintiff P. The proof showed that M. received value for the note, as it was given in the firm name to H. for money which M. owed to him. H. transferred the note to K. in consideration of \$1,200 balance due K. on a deposit which K. had previously made on account of H. in Detroit. K., who was owing P. at the time on purchases of coal, gave P. the note, who gave him credit for so much cash, and at its maturity, it being protested for non-payment, P. charged the amount back to K., who was liable as indorser, and took it up with his own check; K. has paid nothing to P. on account of the note:

Held, that P. was a *bona fide* holder for value and entitled to recover, and that the case was properly disposed of on the trial, by directing the jury to find a verdict for the plaintiff. (*Potts* agt. *Mayer*, *ante*, 368.)

8. In an action by the assignee of The People's Safe Deposit Company, incorporated under chapter 816 of Laws of 1868, page 1839, on a note made by V. C. to the order of, and indorsed by, defendants, and by them delivered to said deposit company, who took the same and paid the defendants the amount of the note, less the discount, at the legal rate of interest, the complaint contained a count upon the note and its indorsement, also for money had

and received. The defense alleged that the corporation had no right, under its charter, to discount the note or to enter into the transaction of discount or loan set out in the complaint:

Held, that as the defendants were willing, at the time they presented the note to the company's officers and asked for the money upon it, to assume and act as though they believed the officers of the company had power to discount the note, it is highly inequitable to allow them, when called upon to pay back the money, to make good their promise, made at the time of the loan, to insist that the company exceeded its charter powers when it parted with its money. (*Pratt* agt. *Short*, *ante*, 506.)

9. The defendants cannot resist payment, on the ground that the corporation in taking the note had passed the bounds of their charter. (*Id.*)

10. This court will not, in a collateral way, decide a question of *misuser* of a safe deposit company organized under a statute of this state. If they exceed their powers the remedy is with the legislature. (*Id.*)

11. The invalidity of contracts made in violation of statutes is subject to the equitable exception, that although a corporation in making a contract acts in disagreement with its charter when it is a simple question of *capacity* or *authority* to contract, a party who has the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. The defendant cannot be permitted to repudiate a contract the fruits of which he retains. Assuming that the note and indorsement were void when taken by the corporation, then the same being avoided by the defendants, the money should be returned to the lender or its assignees, for, in equity, the

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money should never have been taken by these defendants upon a voidable or void security. The action for money had and received will lie under such circumstances. The transaction was not *malum in se*, and the lender may recover. (*Id.*)

12. The assignees of an insolvent corporation have power to sue for and recover the assets of such insolvent corporation which have been improperly parted with by the corporation. (*Id.*)

QUESTIONS OF LAW AND FACT.

1. Questions as to the meaning of particular words used in a special sense in a written instrument, are for the jury. (*Pitney agt. G. F. Ins. Co.*, 65 N. Y., 6.)

Sufficiency of evidence to authorize submission of question of conversion to jury. (*See Tiffany agt. Lord*, 65 N. Y., 310.)

RE-ARGUMENT.

See Costs.

Sweet agt. Chapman, ante, 253.

RESCISSION OF CONTRACT.

1. A contract for the purchase of real estate, which contract required the seller to give a perfect title, in fee simple, free from all incumbrances, may be rescinded where, at the time of the execution of the contract by the seller and the delivery of the deed thereunder, he fraudulently suppressed a fact which rendered the title imperfect. (*Shiffer agt. Dietz, ante*, 372.)
2. Where a party has, by the fraudulent suppression of the existence of incumbrances, induced another to take the title to property, the

purchaser is not bound to wait an unreasonable time in order to give the seller an opportunity to remove those incumbrances before he can rescind. (*Id.*)

8. Where any executor neglects to take upon himself the execution of a will, any power of sale contained in the will may be executed by the executor or executors who shall take upon themselves the execution of such will. (*Id.*)

4. About November, 1873, the plaintiff conveyed a part of the premises in question to Raynor & Morris, who were copartners with him in his purchase. On the 20th of April, 1876, the executors of Raynor and Morris, they having died, reconveyed this portion to plaintiff, and on the 25th of April, 1876, this action was commenced; on the 5th of May, 1876, the plaintiff made a general assignment; on the sixth of November the defendant tendered a deed, executed by himself and wife, to the plaintiff. The contract of sale which the plaintiff, by this action, seeks to rescind, was executed in March, 1872:

Held, that the plaintiff did not lose his right to rescind by his delay in making the rescission, as such delay was caused solely by the representations of the defendant that he would make the title all right.

Held, also, that the conveyance to Raynor and Morris could not deprive these parties of the right of rescission, because such conveyance simply put the legal title where, in equity, it belonged.

Held, further, that the conveyances to plaintiff vested in him the whole title to the property, and his deed tendered to the defendant was, therefore, sufficient. (*Id.*)

5. The subsequent assignment of the plaintiff could not change the status of the parties, which had become fixed on the 25th of April, 1876. (*Id.*)

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6. A parol lease of premises for a year to commence *in futuro* is not an executory contract prior to the time of taking possession. It vests a present interest in the term and cannot be rescinded by either party alone. (*Becar* agt. *Flues*, 64 N. Y., 518.)
7. In case, therefore, of the refusal of the lessee to perform, the lessor is not required to lease to another if he have an opportunity, and is not confined to his remedy for actual damages; but may refuse to accept the rescission and hold the lessee liable for the rent. (*Id.*)

RECEIVER.

1. Since the Code, the appointment of a receiver, in proceedings supplementary to execution, vests in the receiver *all* the property, both *real* and *personal*, of the judgment debtor, without any assignment. (*Hayes* agt. *Buckley*, *ante*, 178.)
2. The provisions of section 7 of chapter 902 of the Laws of 1909 make it the duty of the superintendent of the insurance department, whenever the affairs of any life insurance company which has deposited securities under this act, or the act hereby amended, shall, *in his opinion*, appear in such a condition as to render the issuing of additional policies and annuity bonds of said company injurious to the public interests, to report that fact to the attorney-general, *whose duty it shall then be* to apply to the supreme court for an order requiring the court to show cause why a receiver should not be appointed, and its business closed up. (*Attorney-General* agt. *Atlantic Mutual Life Ins. Co.*, *ante*, 227.)
3. When the superintendent reports to the attorney-general as the statute prescribes, the latter *must* submit the facts to the court, and that tribunal *must* proceed as the law directs. (*Id.*)
4. The supreme court has no power to review the preliminary action of the superintendent in making his report. If any error has been committed or mistake made by the superintendent, the hearing, and that alone, will remedy it. (*Id.*)
5. But it must be proved, to the satisfaction of the court, upon the investigation, that there is danger to the public interests by the continuance of the business of the company, before it would be warranted in making the final order, arresting future operations and appointing a receiver. (*Id.*)
6. Where it appears to the satisfaction of the court that the assets and funds of a life insurance company are not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations, the act (*Laws* of 1899, chapter 902) is imperative as to the duty of the court to enjoin the company from the further prosecution of its business, and to appoint a receiver of all the assets and credits of the company. (*Attorney-General* agt. *Atlantic Mutual Life Ins. Co.*, *ante*, 300.)
7. A receiver authorized to execute upon payment formal satisfaction and discharge of mortgages in his hands as such officer, has authority to receive payment of the amount secured by and to satisfy a mortgage, although the same be not due at the time. (*Hoermans* agt. *Clarkson*, 64 N. Y., 171.)

RECORDING ACT.

1. The filing of a notice of suit pending, and the levy, by virtue of an attachment, upon real estate formerly owned by the defendant but sold and conveyed, to the

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knowledge of the plaintiff, prior to the filing and levy, does not defeat the title of the purchaser, if regular in all respects, save that his conveyance is not recorded; nor is such title subordinated to the lien of the attachment. (*Lamont* agt. *Cheshire*, 65 N. Y., 30.)

2. The provision of the Code (sec. 183), providing for the filing of *his pendens*, making it constructive notice to a purchaser, and declaring that a purchaser whose conveyance is subsequently executed or recorded shall be a subsequent purchaser and shall be bound by the proceedings, simply affects such purchaser "to the same extent as if he were made a party" to the action; and the title of a purchaser so holding under a prior unrecorded conveyance, if made a party, could not, under such circumstances, be affected when plaintiff at the time of filing notice had actual or constructive notice of his rights. (*Id.*)

REFEREES.

1. It is not necessary to the validity of an order of referees, affirming upon appeal a decision of highway-commissioners laying out a highway, that it should show that all of the referees met to deliberate on the subject-matter of the order or were notified so to do, and such an order is not void, although signed by only two of the referees (1 R. S., 519, sec. 89.) (*People ex rel. Becker* agt. *Burton*, 65 N. Y., 453.)
2. If presence or notice to all the referees was required, a return by the referees upon appeal from their decision, signed by all the referees, stating that all were present at the hearing and when the decision was made, and deliberated thereon, is sufficient to sustain the order. (*Id.*)

REFERENCE.

1. Where the complaint is so framed that the plaintiff must recover, if

at all, upon an account stated, although a number of items entered into such account, an order of reference is unauthorized. (*Rowell* agt. *Giles*, ante, 244.)

2. The only proof necessary or proper in such a case must relate simply to and must establish the liquidation and settlement of the amount of defendant's liability at the date when such statement and settlement are claimed to have been made. (*Id.*)
3. The case does not require the "examination" of the account containing the items which entered into such account, thus alleged to have been stated and settled, but only the determination of the issue as to whether such account was or was not stated and settled in the manner and to the extent alleged in the complaint. (*Id.*)
4. Plaintiff moves for a reference of an issue joined upon his claim for services rendered as attorney and counsel for the defendants. His claim, as presented by his bill of particulars, is predicated upon almost daily charges, mainly for consultations with his client and in the services rendered in this employment, thus dividing and splitting up his claim into about 100 items, which is alleged to constitute a long account:
Held, that such a system of exacting compensation for services as managing attorney in any particular transaction, unless expressing matter of agreement between the parties, would necessarily result in a great unfairness, as entirely a departure from any just estimate of the value of an entire service in an entire though continuing employment.
Held, also, that it is not a proper case for reference. The services rendered under such an employment, even if the subject of charges upon the "*quantum meruit*" for each instance of attention given to it, would, at most, partake

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of the character of a bill of goods sold and delivered under the same order, although consisting of numerous items at specific prices delivered at the same or different times. The whole transaction would constitute but one item in a long account. (*Randall agt. Kingsland, ante.*, 512.)

See APPEAL.

Martin agt. Windsor Hotel Company, ante., 422.

5. In an action tried by a referee where evidence is received competent as against one or more of several defendants, it is not error for the referee to refuse to decide, either at the time the evidence is received or at the close of the case, as to which of the defendants the evidence is competent (CHURCH, *Ch. J.*, ALLEN and FOLGER, *JJ.*, *dissenting*). (*Lathrop agt. Bramhall*, 64 N. Y., 865.)

6. A refusal of a referee to pass upon an objection to evidence at the time it is offered, and the receipt thereof with a reservation of the question as to its admissibility until the close of the case, is improper, but is not necessarily fatal to the judgment (CHURCH, *Ch. J.*, ALLEN and FOLGER, *JJ.*, *dissenting*). (*Id.*).

7. Such a reservation is to be considered upon appeal the same as if the objection had been overruled and an exception taken, and if the evidence were proper or could not have affected the rights of the objecting party injuriously, the reservation is not ground for reversal (CHURCH, *Ch. J.*, ALLEN and FOLGER, *JJ.*, *dissenting*). (*Id.*)

8. Where a judgment entered upon the report of a referee, is reversed by the general term this court will not, for the purpose of sustaining the judgment, adopt a theory not set up in the complaint or broached upon the trial. (*Stapenhurst agt. Wolff*, 65 N. Y., 596.)

9. In an action alleging a partnership between the parties (which was denied by the answer) and asking for an accounting, an order of reference was entered directing the referee, 1st. To hear, determine and report as to whether the partnership existed. 2d. Staying proceedings thereon to enable either party to move for a new trial at general term. 3d. If the referee found, or if, upon the motion for a new trial, it should be determined that a partnership existed, then that an accounting be taken by the referee. The referee reported that a partnership existed and directed an accounting. *Held*, that a motion at general term to set aside the report and for a new trial was proper, as was also an appeal to this court from the order of general term granting a new trial (*Code, sec. 268*). (*Johnson agt. Youngs*, 65 N. Y., 599.)

REFORMATION OF WRITTEN INSTRUMENT.

1. To justify a court of equity in changing the language of a written instrument sought to be reformed, it must be proven, and that by proof so clear and convincing as to leave no room for doubt, that it was the intention of both parties to make a contract, not as it appears, but as it is claimed it should have been, and that the intent was frustrated by fraud or mutual mistake. (*Heelas agt. Slevin, ante.*, 356.)

2. It is not enough for the party seeking the reformation to show his own intention, and that he never agreed to the terms of the contract. His remedy, in such case, is to have the contract canceled on that ground. (*Id.*)

3. A tender is not good which was accompanied by a condition which was not called for by either the

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bond or mortgage, in payment of which the tender was made. (*Id.*)

4. To justify a court of equity in changing the language of a written instrument sought to be reformed, in the absence of fraud, it must be established that both parties agreed to something different from what is expressed in the writing, and the proof should be so clear and convincing as to leave no room for doubt. (*Mead agt. W. F. Ins. Co.*, 64 N. Y., 458.)

REMOVAL OF ACTIONS.

1. This action was brought to procure the removal of the three defendants, two of whom resided in New Jersey and one in New York, from their positions as trustees under a mortgage given by the New York and Oswego Midland Railroad Company, and to prevent their acting as trustees *pendente lite*, on the ground that they had been guilty of certain fraudulent and collusive acts whereby the security of the bondholders had been impaired.

The defendant, Opdyke, who resided in New Jersey, applied for the removal of the action to the United States circuit court, on the ground, among others, that there was a controversy in the suit wholly between the plaintiff and himself, which could be fully determined between them. *Held*, that as the defendants were jointly responsible for their acts as trustees, the plaintiff was entitled to prosecute them jointly, and that there was, therefore, no controversy between the plaintiff and the defendant, Opdyke, which could be wholly determined between them, and that the application was, therefore, properly denied. (*Clark agt. Opdyke*, 10 Hun, 388.)

2. The fact that the suit is brought to enjoin and restrain the defend-

ants, is not a ground of removal under the act of 1875. (*Id.*)

3. Under the act of Congress of 1875, providing that there is a controversy, which is wholly between citizens of different States, and which can be fully determined as between them, either one or more of the plaintiffs or defendants may remove the suit to the circuit court, the averments contained in a petition for such removal are not conclusive upon the court, but the existence of the requisite facts must be ascertained by the court, and for that purpose the averments of the petition in regard to them may be controverted by the opposite party. (*Id.*)

4. This action was brought originally against several defendants. Upon a former trial the complaint was dismissed as to all. Upon appeal to this court the judgment was affirmed as to all the defendants except Y., and reversed as to him and new trial granted. Y. thereupon filed a petition to remove the cause to the United States court, under the act of July 27th, 1866 (14 U. S. Stat. at Large, 306), providing for a removal where one of several defendants is a resident of another state. *Held*, that the attempted removal was ineffectual, as at the time Y. was the only defendant, and that the court could take judicial notice of the fact from its own records. (*Vose agt. Yulee*, 64 N. Y., 449.)

5. Also, *held*, that Y. could not have made a case for removal as the action was originally, it being a claim against all the defendants upon a joint liability in equity. (*Id.*)

6. Where a party attempting to remove a cause omits to apply to the United States court for a mandate staying proceedings in the state court, that court will not oust itself of jurisdiction unless such party

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shows that he has strictly complied with the statute. (*Id.*)

7. The rights of parties under the provisions of the act of congress of 1789 (1 *U. S. Stat. at Large*, 79, sec. 12), providing for the removal of causes from a state court into the circuit court of the United States, are governed by the facts existing at the time the action was commenced. It must appear by the petition that at that time plaintiff was a citizen of the State in which the action is brought, and defendant, a citizen of another state. A petition simply stating that either party "is a citizen" is insufficient, as that relates only to the time of the drawing of the petition, and no legal presumption arises therefrom that he was a citizen at the commencement of the action. (*Pechner* agt. *P. Ins. Co.*, 65 *N. Y.*, 195.)

8. Where the statement is as to the citizenship of the plaintiff, it is not aided by the fact that in the verification to the complaint plaintiff is described as of a county in this state. If the complaint can be read with the petition, an averment of residence is not equivalent to an averment of citizenship, and is insufficient. (*Id.*)

REPLEVIN.

See EVIDENCE.

Johnson agt. *Carley*, ante, 326.

1. In an action to recover the possession of personal property, which has not been delivered to the plaintiff, the jury should assess the value of the property and damages for its detention, and not simply find a general verdict for damages: and the judgment in such a case should be for the recovery of the property, or the value thereof in case a delivery could not be had, together with damages for its detention. (*Phillips* agt. *Melville*, 10 *Hun*, 211.)

2. Where, in an action of replevin, the plaintiff recovers a judgment for the possession of the property with damages for its detention, and for a fixed sum in case a return cannot be had, he cannot maintain an action against the sureties to an undertaking, given by the defendant, in pursuance of section 211 of the Code, until an execution has been issued to the sheriff in pursuance of the judgment and the same has been duly returned unsatisfied. (*Hager* agt. *Clute*, 10 *Hun*, 447.)

3. In the action of replevin to recover a quantity of grain it appeared that defendant had mixed other grain of his own with that claimed by plaintiff. Defendant stated when the grain was taken by the sheriff that it was all raised on plaintiff's land. *Held*, that the case was simply one of confusion of goods, and as the grain could not be separated, defendant could not thus by his own act defeat the action, but must bear the loss resulting therefrom. (*Samson* agt. *Rose*, 65 *N. Y.*, 411.)

RES-ADJUDICATA.

See IMPRISONED DEBTOR.

Matter of Roberts, ante, 199.

Matter of Smal, ante, 483.

1. In an action of ejectment the defendants set up in their answer that the premises in question, together with others, were conveyed to the plaintiff by their ancestor, Enos Burke, in pursuance of an agreement by which plaintiff was to advance to him \$7,200; that Burke was to occupy and cultivate the same for his own benefit; that upon receipt of the said sum, with interest, plaintiff was to account and reconvey the premises to Burke; that such repayment had been made, and they therefore demanded an accounting and a reconveyance. (*Candee* agt. *Burk*, 10 *Hun*, 350.)

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2. The plaintiff alleged in his reply, and subsequently proved upon the trial, that a prior action had commenced by the said defendants against the plaintiff, in which they claimed that the plaintiff made an arrangement with Burke, by which he was to advance money to the latter and take a conveyance of the premises in question, with others, as security for the repayment thereof; that Burke was to remain in possession; that he, until his death, and thereafter the defendants had continued so to do; that the full amount due the plaintiff herein had been paid, whereupon they demanded an accounting and reconveyance; that judgment was entered therein in favor of the present plaintiff, holding that the conveyance was an absolute and unconditional deed, and not a mortgage or security for any loan made to Burke, and that the title to the premises was vested absolutely in the plaintiff herein. (*Id.*)

3. Upon the trial of this action, *held*, that the cause of action in the former suit and the defense set up in the answer in this case were in substance the same, and that the judgment in the former action was a bar to the defense set up in the answer herein. (*Id.*)

4. Where, upon an application made by an insolvent debtor for a discharge, it appears that a similar application has already been made to one of the judges of the court of common pleas of the city of New York, and having been fully heard, has been decided against him upon the merits, *held*, that the matter should be regarded as *res adjudicata* and the application denied. (*Matter of Roberts*, 10 *Hun*, 248.)

REVIVAL OF ACTION.

1. After issue joined in an action, brought to recover the possession

of personal property, the plaintiff died, and thereafter the action was revived in the name of his widow as his executrix. Upon the trial it appeared that the husband had no title to the property, but that the same was owned by the wife in her own right. *Held*, that the court had no power to amend the summons and complaint by striking out the word "executrix," and thus allow the plaintiff to recover by virtue of her own title to the property. (*Phillips agt. Melville*, 10 *Hun*, 211.)

SET-OFF.

1. A promise made by one person for a valuable consideration, paid by another, to pay the debts of the latter, is in legal effect a promise to pay creditors who are such at the time the promise is made. They acquire thereby additional security for the payment of their debts, which will pass as an incident on assignment of one of the debts secured, but the assignee takes it by a derivative title from the assignor, and no direct contract is created by the assignment between him and the promisor. (*Barlow agt. Myers*, 64 *N. Y.*, 41.)

2. It is immaterial that the debts are upon negotiable instruments not due. In the absence of special words indicating such an intent, the promise is not to the persons holding the instruments at their maturity; and the interest of the assignee in the promise is subject to any equities on the part of the promisor existing against the debt while in the hands of the assignor. (*Id.*)

3. Where, therefore, defendant, in consideration of the transfer to her of the property of the firm of R. & W., promised to pay the debts of the firm, among which were certain promissory notes not due, then held by N. R., who before maturity assigned them to plain-

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tiff, in an action upon the promise, *held*, that defendant could set off a claim held by her against N. R. (*Id.*)

4. A right to set off a judgment in favor of A. against B., against a judgment in favor of B. against A. cannot be asserted by motion on behalf of A., where it appears that before B.'s judgment was obtained he assigned his claim to a third person. If A. has any equities they can only be enforced by action, not by motion. (*Swift agt. Prouty*, 64 N. Y., 545.)

5. As to whether an order denying a motion to set off one judgment against another is reviewable here, *quere.* (*Id.*)

SETTLEMENT.

1. Where no judgment has been entered in an action, an attorney has no vested right to costs therein. Whatever claim he has for his services is against his client on the retainer. (*Sullivan agt. O'Keefe*, *ante*, 426:)
2. Although there are cases holding that a party may not discharge a judgment actually entered, and thus deprive his attorney of his costs in such judgment, yet *it seems* that parties may settle their controversies without consulting the wishes of their attorneys, or even against their wishes, save where judgment has been entered including costs, or where the attorney has obtained a lien on the subject matter of the action. (*Id.*)
3. The attorney gets no such lien under his retainer alone. (*Id.*)
4. Where an action was brought for the specific performance of a contract for the sale of real property, after the cause was at issue, but before the trial, the parties made a settlement of the subject of the action, notwithstanding which the

defendant's attorney insisted upon proceeding with the action unless his costs were paid him. The plaintiff thereupon moved for a dismissal of the action.

Held, that, as in fact there was no longer a controversy between the parties, the action should not be continued at their expense, either for the profit or emolument of others, and that the motion for discontinuance should be granted. (*Id.*)

SHERIFF.

1. After the commencement of an action, brought against the sheriff for a failure to return an execution within sixty days, he returned the same indorsed *nulla bona*. Upon the trial the plaintiff proved the issuing of the execution, and its return and indorsement after the commencement of the action.

Held, That as the return was made by a public officer of an official act he was bound by law to make, it was evidence in favor of the officer making it. (*Bechstein agt. Sammis*, 10 Hun, 585.)

2. That its admissibility was not affected by the fact that it was made after the commencement of the action. (*Id.*)
3. That as the plaintiffs did not contradict the return, he was entitled to recover only nominal damages. (*Id.*)
4. The plaintiffs having purchased a quantity of sugar from H. & D., of New York, the price thereof, while in plaintiffs' hands, was attached by the sheriff of New York, under an attachment issued in an action against H. & D. Subsequently one V. brought an action against the plaintiffs, to recover the price of the sugar, claiming that he was the owner thereof, and that H. & D. were merely his agents to sell the same. This action was brought by the plaintiffs,

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in the county of Kings against the sheriff and the attaching creditors and V., praying that they might be compelled to determine their conflicting claims to the sugar between themselves. *Held*, upon the application of the sheriff, that he was entitled, under section 124 of the Code, to have the place of trial changed to the county of New York. (*Wintjen agt. Verges*, 10 Hun, 576.)

5. A tender to a sheriff by the judgment debtor of the full amount collectible upon an execution in the hands of the former discharges the lien of the execution upon property levied by virtue thereof; and in case of a refusal to accept the tender, and a subsequent sale of the property under the execution, an action for conversion will lie. (*Tiffany agt. St. John*, 65 N. Y., 314.)

6. In such an action it appeared that the judgment upon which the execution was issued was rendered by the marine court of New York city, for sixty-seven dollars and forty-four cents. As the sheriff was proceeding to sell property levied upon, plaintiff (the judgment debtor) tendered \$120. The sheriff refused to accept, claiming the tender to be insufficient. The defendant thereupon forbade the sale, but the sheriff proceeded with it. Defendant (the judgment creditor) was present and within hearing distance at the time of the conversation, and subsequently was heard to converse respecting the tender he bid upon the property. *Held*, that the tender was *prima facie* sufficient in amount; that if defendant was aware of the facts he was liable for the conversion; and that the evidence was sufficient to authorize the submission of that question to the jury. (*Id.*)

7. The provisions of section 243 of the code, in reference to sheriffs' fees on attachment, only apply to

attachments in courts of records. Officers executing attachments issued out of justices' courts or the marine court of the city of New York have no authority to make charges in addition to their regular fees; these include compensation for caring for property attached. (*Id.*)

SPECIFIC PERFORMANCE.

1. The complaint set out an agreement or contract in writing for the delivery of a deed of land and the payment of the consideration on or before May 1, 1875. It was also averred that before that day the party whose duty it was to deliver the deed applied to the party who was to pay the consideration, to name a time and place for performance, to which such party did not reply. It is also alleged that he subsequently executed a deed, in due form, and made all reasonable efforts to find and communicate with the other party to complete the agreement, but which efforts, through the acts and omissions of the other party, were unavailing:

Held, that the complaint, although it failed to show a strict performance of the agreement by the plaintiff, alleged such a state of facts as directly tended to excuse it, and which entitled him to have the agreement specifically performed. (*Buess agt. Koch*, ante, 92.)

See CONTRACT.

Diets agt. Parish, ante, 217.

STATUTE OF LIMITATIONS.

1. The plaintiff, in 1851, loaned to the defendant, her sister's husband, \$1,800, of which \$1,600 remained unpaid in the year 1861. In 1866 defendant paid \$200 thereon. In 1873 he signed and delivered to the plaintiff the following paper: "Received January, 1861,

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- from Mrs. J. R. Kincaid, the sum of \$1,600, for which I agree to pay interest, at the rate of seven per cent per annum, from this date. Paid January, 1866, to Mrs. Kincaid on the above, \$200." (*Kincaid agt. Archibald*, 10 Hun, 9.)
2. In an action to recover the amount due thereon:
Held, (1) that parol evidence was admissible to show the time of the execution and delivery of the paper.
 (2) That, although it contained no express promise to pay the principal, yet, as it contained an explicit admission of an existing indebtedness and a promise to pay the interest thereon, that it was sufficient to remove the bar of the statute of limitations, which had run against the debt at the time of its delivery. (*Id.*)
 3. In an accounting by an administrator no written pleadings are necessary to entitle a party to the protection of the statute, but it must be set up or urged before all the evidence has been taken so that the claimant may have an opportunity to introduce evidence which may relieve him from the operation thereof. (*Clock agt. Chadeagne*, 10 Hun, 97.)
 4. Where money is deposited with any individual, not a banker, trustee or agent, upon an agreement that he shall pay interest thereon, and that the same shall not be withdrawn except by drafts, payable thirty days after sight, no presumption of payment arises, nor will the statute of limitations run against the debt, until it is shown that drafts drawn against the said person, in pursuance of the agreement, have been presented and dishonored. (*Sullivan agt. Foodick*, 10 Hun, 173.)
 5. It rests upon the party claiming the benefit of the statute to show the presentation and dishonor of such drafts. (*Id.*)
 6. In March 1854, \$4,000 were deposited with one D., upon the agreement that he should pay interest thereon at the rate of six per cent per annum, and that the principal should only be withdrawn by drafts, payable thirty days after sight. March 7, 1855, D. wrote to the depositor stating that he had credited him with \$240, being the interest to March 1, 1855. In an action brought by the administrator of the depositor in 1876, *held*
 (1) That no presumption of payment arose under the statute of limitations in regard to the \$4,000, until the presentation and dishonor of drafts drawn against the same;
 (2) That the letter informing the depositor that the interest due March 1, 1855, had been credited to him, did not have the effect of adding the amount thereof to the principal, so as to cause it to bear interest thereafter, nor did it make that amount then due, so that the statute of limitations would then commence to run against it. (*Id.*)
 7. The defense interposed in the action was that of an adverse possession commenced in 1842. *Held*, that as the trustee under the deed in no way represented or was bound to protect the interests of the plaintiff, whose interest was subject to a life estate, the statute did not commence to run against her until her right of action accrued, upon the death of her mother, in 1871. (*Bennett agt. Garlock*, 10 Hun, 328.)
- Effect of bankruptcy of debtor on running of—counter-claim, in action by assignee in bankruptcy—reply to, by assignee. (*See Von Sachs agt. Kretz*, 10 Hun, 95.)

STAY OF PROCEEDINGS. •

1. Where, after the entry of an interlocutory judgment or decree, a motion is made for a new trial on

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a case and exceptions under section 268 of the Code, such motion does not stay proceedings under the interlocutory judgment or decree. (*Bennett* agt. *Austin*, 10 *Hun*, 451.)

STREETS IN CITY OF UTICA.

1. The provisions of the statute (*Laws of 1862, chap. 18*) in relation to the duties of the common council of the city of Utica, in proceedings for the opening and extension of streets in that city, must be strictly followed. (*Matter of Schreiber*, ante, 359.)
2. By section 85 of the charter, if the common council, under its provisions, after hearing the parties interested, should determine to make the improvement, *it is obligatory on them to enter in its minutes a resolution declaring such determination*. An omission to comply with section 85 is fatal to all the proceedings which followed. (*Id.*)
3. On an appeal from action of the Utica common council, the original papers were filed with the county clerk in time, but the copies were not served until the twenty-first day after the second report of the commissioners appointed therefor had been filed. The objection is taken at the hearing of the appeal, that the appeal papers were not served in time:

Held, that the respondent should have moved to dismiss the appeal, and not having done so and allowing a special term to pass, he waived his right. (*Id.*)

SUMMARY PROCEEDINGS.

1. Where a tenant has been evicted by the landlord from a portion of the demised premises of substantial value, he cannot be evicted in summary proceedings for non-pay-

ment of rent so long as such eviction continues. (*People ex rel. Murphy* agt. *Gedney*, 10 *Hun*, 151.)

2. An averment in an affidavit, made in summary proceedings instituted to remove a tenant, that the amount specified is due for the rent of the premises, in pursuance of the agreement by which the premises were "let," in connection with a statement that the defendant holds over and continues in possession of said premises, is substantially equivalent to the statement that the amount is due pursuant to the agreement under which the premises are "held," as required by the statute. (*People ex rel. Hughes* agt. *Lamb*, 10 *Hun*, 848.)
3. The certificate of the constable, showing a service of the summons upon the defendant personally, by showing the original and delivering a copy thereof to him, is "due proof" of the service thereof. (*Id.*)

SUMMONS.

1. A constable's return to a justice's court summons was as follows: "Served, copy left the 9th day of February, 1869." *Held*, that the return was insufficient to show a legal service by copy, or to authorize the justice to proceed in the action in the absence of defendant. (*Sperry* agt. *Reynolds*, 65 *N. Y.*, 179.)

SUPPLEMENTARY PROCEEDINGS.

1. The personal representatives of a deceased judgment creditor, in whose lifetime an execution was issued upon the judgment and returned unsatisfied, may, upon showing that fact, and giving proof that letters testamentary or of administration had been issued

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- to them, have an order for the examination of the defendant in proceedings supplementary. (*Walker agt. Donovan, ante, 8.*)
2. It is not necessary in such a case, before the personal representative can proceed to enforce the judgment, that the action should be revived and continued in their name. (*Id.*)
 3. By the amendment of section 283 of the Code in 1866, it was provided that in case of the death of the person in whose favor the judgment was given, his personal representatives duly appointed might, at any time within five years after the entry of the judgment, enforce it by execution. Since this amendment, it is no longer necessary to bring an action on the judgment in the nature of a *scire facias* to have the executor or administrator made a party to the judgment to enable him to institute summary proceedings to reach the equitable assets of the debtor. (*Id.*)
 4. The affidavit upon which the order for the examination of the defendant is asked must set forth the judgment; that the party who applies for the order is the sole executor or administrator of the judgment creditor; that an execution was issued, and the date of it; that it was returned unsatisfied; that the judgment creditor is dead, and that letters testamentary or of administration were duly issued to him, and that he duly qualified and has ever since acted as his executor or administrator. (*Id.*)
 5. Any defense or answer which the judgment debtor has to the enforcement of the judgment, except matters which ought to have been pleaded to the original action, or which existed prior to the judgment, is available to him where an order is obtained for his examination in supplementary proceedings. (*Id.*)
 6. Since the Code, the appointment of a receiver, in proceedings supplementary to execution, vests in the receiver *all* the property, both *real* and *personal*, of the judgment debtor, without any assignment. (*Hayes agt. Buckley, ante, 178.*)
 7. On November 27, 1874, a judgment was recovered against the defendant Elmore, who was in possession of and entitled to a life estate in certain real property. Execution having been issued upon said judgment and returned unsatisfied, supplementary proceedings were instituted, in which, on June 25, 1875, a receiver of the property of said Elmore was duly appointed by an order which was duly recorded. July 1, 1875, the receiver conveyed all the right, title and interest of Elmore in the said real estate to the plaintiff. Elmore never made any conveyance to the receiver, nor was any order ever made by the court requiring him so to do, or directing a sale by the receiver.
Held, that the receiver was not vested, by virtue of his appointment, with any title to the real estate owned by the judgment debtor, nor did the plaintiff acquire any interest therein by virtue of the conveyance from him. (*Scott agt. Elmore, 10 Hun, 68.*)
 8. A judge or referee in supplementary proceedings is vested with the same power of adjournment that a master in chancery had when acting under an order for the examination of a debtor in a creditor's suit, and he may adjourn the proceedings from time to time, even though the debtor to be examined refuses to consent thereto. (*Kaufman agt. Thrasher, 10 Hun, 438.*)
 9. A receiver appointed in proceedings supplementary to execution, may maintain an action to recover real or personal property transferred by the judgment debtor in

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- fraud of his creditors. (*Underwood agt. Sutcliffe*, 10 Hun, 453.)
10. No person can avail himself of an irregularity in the proceedings in which the receiver was appointed, except the judgment debtor himself. (*Id.*)
 11. Proceedings supplementary to an execution are in the nature of an action, and the court does not lose jurisdiction thereof, by a failure of either or both of the parties to appear on a day to which they have been adjourned by the judge or referee. (*Id.*)
 12. Where, in such a case, the attorney for the judgment debtor appears before the judge, in obedience to a notice to show cause why a receiver should not be appointed, and makes no objection thereto, all objections to the regularity of such proceedings are thereby waived. (*Id.*)
- ### SURETIES.
1. To entitle a plaintiff to maintain an action against the sureties on an undertaking given in pursuance of section 348 of the Code for the purposes of an appeal, notice of entry of the order or judgment affirming the judgment appealed from must be served upon the adverse party ten days before the commencement of the action. (*Roe agt. Harteau*, ante., 25.)
 2. The commencement of the action before the lapse of ten days after notice, is fatal to the recovery. (*Id.*)
 3. This notice, like all other notices required by the Code, must be given in writing, and must be so explicit as plainly to give the information required by the statute. (*Id.*)
 4. The decision upon an appeal taken by the principal can, in no way, be effectually decided or disposed of by an "order," but only by a judgment of affirmance duly perfected. (*Id.*)
 5. An order is but a decision upon a motion, and is expressly distinguished from a judgment which is defined as the final determination of the rights of the parties. A judgment is to be entered in the judgment book and perfected by the filing of a judgment roll from which the right of appeal from a judgment would begin to run. (*Id.*)
 6. Notice of the judgment so perfected is the notice required by the statute (*Code sec. 348*) to be served on the adverse party ten days before the commencement of the action on the undertaking. (*Id.*)
 7. Where the defendant McC., after making the mortgage in suit, conveyed the mortgaged premises to defendant W., she assuming the payment of the mortgage, and upon the maturity of the bond and mortgage, McC. having come into the position of surety, requested the plaintiff (the mortgagee) to proceed immediately to foreclose and collect the debt; the plaintiff neglected for a year to commence his suit, and the proof showed that although the premises were of sufficient value to pay the mortgaged debt and costs of foreclosure at the time the request was made, they have since so far depreciated as to make it altogether probable that there will be a deficiency after applying the proceeds of the sale:
Held, that McC., occupying the position of surety, should not be made liable for any deficiency arising upon such foreclosure and sale. (*Russell agt. Weinberg et al. Ante*, 468.)
 8. Where, in an action of replevin, the plaintiff recovers a judgment for the possession of the property, with damages for its detention,

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and for a fixed sum in case a return cannot be had, he cannot maintain an action against the sureties to an undertaking given by the defendant, in pursuance of section 211 of the Code, until an execution has been issued to the sheriff in pursuance of the judgment and the same has been duly returned unsatisfied. (*Hager* agt. *Clute*, 10 *Hun*, 447.)

SURROGATE.

1. The surrogate of New York has no power, under the act of 1870 (*Laws of 1870, section 9, chapter 359*), to make allowances to parties who do not prevail in cases contested before him. (*Noyes* agt. *Children's Aid Society*, ante, 10.)

2. He may excuse such parties, if the case be in his judgment a proper one, from the payment of costs personally, but he cannot take the subject-matter of the contest, which he adjudges to belong to the successful party, and distribute it, or any part of it, among his defeated antagonists. (*Id.*)

See EXECUTORS AND ADMINISTRATORS.

Matter of Hahlin, ante, 501.

3. A surrogate has no jurisdiction or authority to pass upon the validity of a claim against an estate presented by an executor in his own behalf, where the same is contested, nor can a reference be ordered in such a case to determine the same, though all the parties consent thereto. (*Shakespeare* agt. *Markham*, 10 *Hun*, 311.)

4. The expenses incurred by an executor in an unsuccessful attempt to enforce before the surrogate, a claim made by him against the estate, including the fees of an auditor and his own counsel fees therein, should not be allowed to him out of the estate. (*Id.*)

5. Where one of the next of kin of a deceased person, entitled to a distributive share of his estate, calls the administrator to an account, and, upon the hearing, claims to be entitled, by assignment, to the shares of three of the other next of kin, it is error to direct that the amount of said shares should be paid over to him, unless the persons originally entitled thereto are made parties to the proceeding, as otherwise the decree would afford no protection to the administrator. (*Clock* agt. *Chadagne*, 10 *Hun*, 97.)

6. A surrogate cannot entertain proceedings instituted by one of the next of kin of a deceased person against an administrator, to enforce the payment of a distributive share of the estate of the deceased, when such proceedings are not commenced before the expiration of the time within which the distributee might have brought an action under section 9 of 2 Revised Statutes, 114. (*Id.*)

7. In such proceedings no formal written pleading is necessary to entitle the party to the protection of the statute, but it must be set up or urged before all the evidence has been taken, so that the claimant may have an opportunity to introduce evidence which may relieve him from the operation thereof. (*Id.*)

8. Under chapter 394 of 1870, authorizing an executor or administrator to institute an inquiry as to any effects of the deceased, believed to be withheld or concealed from him, the surrogate acts judicially in conducting the examination, and the testimony receivable therein is subject to the restrictions of section 390 of the Code, prohibiting the admission of evidence given by parties interested in the proceeding as to personal transactions had with deceased. (*Tilton* agt. *Ormsby*, 10 *Hun*, 7.)

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9. In order to justify an order requiring the delivery of the property to the executor or administrator, the surrogate must find, as a fact, that it belongs to the estate; it is not enough that he should determine that there is probable cause to believe that it belongs to it. (*Id.*)

10. The order should specify distinctly the property, the delivery of which is required, and an order which, after specifying certain articles, proceeds, "and all other property, goods, &c., of the said (deceased), in her possession or under her control at her place of residence," is too broad and must be reversed (*Id.*)

11. Power of, under section 6 of chapter 359 of 1870, to appoint a referee to examine an account and report thereon to him, where objections are filed by the applicant to an account rendered pursuant to an order, made on an application for an accounting by one executor requiring his co-executor to render and file an account under 2 Revised Statutes, 92, section 52. (*Buchan* agt. *Rintoul*, 10 *Hun*, 183.)

12. Under the provisions of 2 Revised Statutes, 223, section 10, providing that "the surrogate may award costs to the party in his judgment entitled thereto to be paid either by the other party personally or out of the estate," the surrogate is authorized to award costs to the successful party only, and he has no power to award costs to the defeated contestants. (*Noyes* agt. *Children's Aid Society*, 10 *Hun*, 289.)

13. Section 9, of chapter 359 of 1870, providing that "the surrogate of said county (New York) may grant allowances in lieu of costs to counsel in any proceedings before him in the same manner as are now prescribed by the Code of Procedure," restricts his power

to make allowances, to those cases in which he is authorized to award costs under the provisions of the Revised Statutes, and he has, therefore, no power under the said act to make allowances to the unsuccessful parties in cases contested before him. (*Id.*)

TAX.

1. Certain lands of the plaintiff with the buildings thereon, were, by statute, exempt from taxation, the same being used exclusively for public worship.

Held, that the plaintiff could maintain an action in equity to set aside a tax imposed thereon, and a sale made for its non-payment, no deed having been executed to the purchaser, the invalidity of the tax not appearing on the face of the assessment, but required to be established by extrinsic facts. (*Congregation Shaari Tephila* agt. *Mayor*, &c., *ante*, 213.)

See INJUNCTION.

Mayn agt. *Board of Education*, *ante*, 289.

TENDER.

1. The omission of the plaintiff to have the deed executed on or before the 1st of May, 1875, and tendered on that day at defendant's residence, was equitably excused by the other acts performed by him. A formal tender was waived by the acts and omissions of the defendant. (*Buess* agt. *Koch*, *ante*, 92.)

2. A tender to a sheriff by the judgment debtor of the full amount collectible upon an execution in the hands of the former discharges the lien of the execution upon property levied by virtue thereof; and in case of a refusal to accept the tender, and a subsequent sale of the property under the execu-

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tion, an action for conversion will lie. (*Tiffany* agt. *St. John*, 65 N. Y., 314.)

3. In such an action it appeared that the judgment upon which the execution was issued was rendered by the marine court of New York city, for sixty-seven dollars and forty-four cents. As the sheriff was proceeding to sell property levied upon, plaintiff (the judgment debtor) tendered \$120. The sheriff refused to accept, claiming the tender to be insufficient. Plaintiff thereupon forbade the sale, but the sheriff proceeded with it. Defendant (the judgment creditor) was present and within hearing distance at the time of the conversation, and subsequently was heard to converse respecting the tender he bid upon the property. Held, that the tender was *prima facie* sufficient in amount; that if defendant was aware of the facts he was liable for the conversion; and that the evidence was sufficient to authorize the submission of that question to the jury. (*Id.*)

TENEMENT-HOUSE.

1. The conversion and change by defendant of his two houses into French flat or apartment-house is a violation of his covenant not to erect a tenement-house. A building which is to be occupied by tenants, in name and in fact, is clearly within the true meaning and definition of a *tenement-house*. (*Musgrave* agt. *Sherwood*, ante, 311.)

TORT.

1. Where a party brings an action for money had and received, for the purposes of the action, he waives a tortious receiving or withholding the money. (*Gopen* agt. *Crauford*, ante, 278.)
2. The character of the action is determined by the complaint, and

not by the form of the summons. (*Id.*)

3. An allegation that the defendant "received the money as an attorney at law," does not necessarily make his refusal to pay over wrongful. He may still have a valid ground for holding on to the money. To have that effect, it must be alleged that he wrongfully withholds the money. (*Id.*)
4. To an action brought against an attorney at law for moneys received by him as such, he may set up by way of counter-claim a demand in his favor against the plaintiff for services rendered. (*Id.*)

TRADE-MARK.

1. Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, acquired by advertising their wares under representations which are false. (*Seabury* agt. *Grosvenor*, ante, 192.)
2. A court of equity will refuse to interfere in behalf of persons claiming property in a trade-mark where such person is shown to be advertising his wares under representations which are false. He is entitled to no protection in a business carried on by means of untrue representations and statements. An order of a court should not suppress the publication of the truth and allow the utterance of a falsehood (*See, to same effect, Seabury* agt. *Grosvenor*, ante, 192). (*Helmbold* agt. *Henry T. Helmbold Manufacturing Co.*, ante, 453.)
3. Where the plaintiff undertakes to sell his compound, not only under the name and alleged trade-mark which Henry T. Helmbold formerly used, and which he still claims to use under and through the corporation with which he is now connected, but upon a representa-

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tion that said Helmbold superintends, personally, its manufacture, and by his own signature certifies to the genuineness of each bottle:

Held, that this is clearly and confessedly false, and the plaintiff is entitled to no protection in a business carried on by means of such untrue and false representations. (*Id.*)

4. A trade-mark must, as the term imports, be one consisting of a word, an expression, a device or a mark invented or adopted by the owner which designates and distinguishes his production from the general manufacture of the same article, and it cannot be the appropriation of words belonging to the general public which describe truly a known product. (*Id.*)

5. A particular process of manufacture may be owned when the legal steps to acquire such ownership have been taken, or a particular mark or name designating the manufacturer may by use become the subject of protection, but words and phrases in common use, describing truly an article offered to the public, cannot become individual property any more than those generally employed in life which must be used to make speech intelligible. (*Id.*)

6. Personal knowledge and the right to use words truly descriptive of things cannot, by legal process, be taken from an individual against his will, and without his voluntary surrender and assignment thereof. (*Id.*)

7. Although a person can by voluntary sale and assignment transfer the right to use his knowledge and name, the right to use his own knowledge and name cannot be taken from him through the order of a bankrupt court, or by any other judicial proceeding whatever. (*Id.*)

8. The name of a man is a part of his being, so indissolubly connected with and attached to him, and which distinguishes and separates him from all mankind, and enables the public to know him and that which he has prepared; it cannot be taken from him and given to another, so that the latter, by the use of such name, may vend and sell his own preparations as if they were those of the former. (*Id.*)

9. The decree or judgment of one court cannot be shown in another by the oral statement of a witness; the record, or an exemplified copy thereof, must be produced. (*Id.*)

TRANSFER OF STOCK.

1. An action or bill in equity may be maintained against a corporation, on behalf of a holder of its stock, to compel a transfer to him by the company on its books. (*Cushman agt. Thayer Manufacturing Jewelry Co., ante 60.*)

2. A court of equity, in a proper case, may decree the transfers of shares of stock on the books of the company. (*Id.*)

3. The customary action by a party injured by the refusal of a corporation to make transfer to him, is an action at law for damages in which he is entitled to recover its full market value. (*Id.*)

4. But where the shares of the capital stock of a corporation have no market value upon which an assessment of damages in an action at law could be based, their value depending upon the future operations of the company, the company having it in their power to suspend its operations *in toto* so as to make the stock of no value, and thus decrease the law damage to a mere trifle, the capital stock being limited and not easily, if at

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all, procurable in the market, the transfer of the shares owned by plaintiff being effected in fraud of her rights by her husband and one Beales, the transferee, and made on the books of the company by the officers of the company in bad faith, the original certificates not being produced nor properly accounted for, and the transfer being made to one of the officers of the company:

Held, that the equitable power of the court may be invoked and the company compelled to transfer the shares of stock to plaintiffs on their books. (*Id.*)

TRIAL FEE.

1. After an action has been noticed for trial and placed upon the calendar, and just as it was about to be moved for trial, an order was entered discontinuing the action upon payment of costs. *Held*, that the defendant was not entitled to include a trial fee in such costs. (*Sutphen* agt. *Lash*, 10 *Hun*, 120.)

TRIAL OF ACTION.

After service of an offer to allow judgment to be taken, but before the expiration of ten days from such service — plaintiff entitled to disregard the offer, and tax the costs thereafter accruing. (*See Herman* agt. *Lyons*, 10 *Hun*, 111.)

1. One F. transferred to plaintiff by deed in trust, among other things, a demand against defendant for money loaned. F. subsequently brought suit against plaintiff to set aside the trust, in which action defendant was sworn as a witness. Plaintiff succeeded in the litigation. In an action upon the claim defendant proved payment to F. Plaintiff requested the court to charge that the pendency of said action brought by F. was constructive notice to defendant of the

existence of the trust deed. The court refused so to charge. *Held*, no error; that whether defendant had notice of the character of the action sufficient to put him upon inquiry was a question of fact for the jury. (*Heermans* agt. *Ellsworth*, 64 *N. Y.*, 159.)

2. In an action to recover damages for an injury resulting from a collision between plaintiff's carriage and one alleged to belong to defendant, through the negligence of the coachman driving the latter, the principal question on the trial was as to whether the carriage belonged to defendant or his daughter, to whom defendant claimed to have sold it and the horses. It was not claimed by defendant that the employment of the coachman was separate from the ownership of the carriage and horses, and the evidence showed them inseparably connected. The court charged that, if defendant did not own the carriage and horses, no recovery could be had. Defendant's counsel requested him to charge that if the jury find the coachman was not the servant of the defendant but of the daughter, they could not find for plaintiff. The court remarked that he did not see how he could separate the two things on the evidence, and said counsel excepted to the refusal to charge as requested. *Held*, that the remark could not be construed as a refusal to charge the request as a legal proposition, but only that as a question of fact: the ownership of the carriage and horses and the employment of the coachman could not be separated, and that the form of the exception did not change the effect of the decision. (*Sloane* agt. *Elmer*, 64 *N. Y.*, 201.)
3. Plaintiff built a house upon the land of his wife, in which he lived with his family, having possession and control thereof. He operated the farm in his own name, owned the stock and provided for his

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- family. In an action for unlawfully and violently breaking into and entering the dwelling-house the court charged that plaintiff could not recover for damages to the house. *Held*, error; that the facts were sufficient to authorize a finding of a possession in plaintiff sufficient to entitle him to maintain the action. (*Alexander* agt. *Hard*, 64 N. Y., 228.)
4. In an action upon a policy of life insurance the defense was the falsity of various answers to questions in the application which were, by the terms of the policy, made warrantless. After the defendant's counsel had, upon the trial, specified certain answers which he claimed to be false, on motion to dismiss, in exceptions to the submission of questions to the jury and in requests to charge, he requested the court to charge that upon the policy and the evidence the plaintiff could not recover anything beyond the amount of the last premium. *Held*, that the general objection did not entitle defendant to raise on appeal points as to the falsity of answers which were not specified, and as to which no question of law was raised and passed upon on the trial. (*Boos* agt. *W. M. L. Ins. Co.*, 64 N. Y., 236.)
 5. In answer to a question as to whether he had had, during the last seven years, any severe sickness or disease, the insured answered "No." The policy was issued in 1870. Evidence was given showing that in 1865 the insured had an attack of pneumonia which lasted ten days, during which he was attended by a physician. Plaintiff's witnesses testified that during this time he was a strong, healthy man. One witness, not shown to be competent to speak as to the nature of the illness, testified that plaintiff had sunstroke in 1868, or 1865. *Held*, that the court was not bound to decide, as matter of law, that either was "a severe sickness or disease" within the meaning of the question, and that the question of a breach of warranty was one of fact for the jury. (*Id.*)
 6. In an action tried by a referee where evidence is received competent as against one or more of several defendants, it is not error for the referee to refuse to decide, either at the time the evidence is received or at the close of the case, as to which of the defendants the evidence is competent (*CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting*). (*Lathrop* agt. *Bramhall*, 64 N. Y., 365.)
 7. A refusal of a referee to pass upon an objection to evidence at the time it is offered and the receipt thereof, with a reservation of the question as to its admissibility until the close of the case, is improper, but is not necessarily fatal to the judgment (*CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting*). (*Id.*)
 8. Such a reservation is to be considered upon appeal the same as if the objection had been overruled and an exception taken, and if the evidence were proper or could not have affected the rights of the objecting party injuriously, the reservation is not ground for reversal (*CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting*). (*Id.*)
 9. Where a party requests certain specified questions to be submitted to the jury for which there is no valid ground, it will be assumed that he intends to waive the submission of other questions, and a refusal to submit the case to the jury is proper. (*Dounce* agt. *Dow*, 64 N. Y., 412.)
 10. An expression of opinion in a charge to a jury as to a question of fact, however decided, is not the ground of an exception, if no direction is given to the jury to find in accordance with such opin-

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ion, and the question is fairly left to them to decide upon their own judgment. (*Massoth* agt. *D. and H. C. Co.*, 64 N. Y., 524.)

11. A variation between the complaint and the proof as to the details of a fraudulent conspiracy, and the mode in which it is carried out, if the proof establishes such a conspiracy and an injury to plaintiff consequent upon the carrying out of the fraud, is not a failure of proof within the meaning of the code (*sec. 171*), and will not justify a dismissal of the complaint. Without proof "to the satisfaction of the court" that defendant has been misled, the variance is to be deemed immaterial, and no amendment of the complaint is necessary. (*Place* agt. *Minster*, 65 N. Y., 89.)

12. In an action for conspiracy, it is within the discretion of the trial court to allow evidence of the declarations of one of the alleged conspirators to be given prior to proof of the conspiracy, and conditional upon the production of such proof thereafter. (*Id.*)

13. The rule requiring such preliminary proof should not be departed from, however, save under particular and urgent circumstances. (*Id.*)

14. In an action tried at O. for the unlawful taking and conversion of a canal boat at N. Y., a witness for the plaintiff, who testified that he resided at O., was asked the value of the boat. This was objected to on the ground that the value of the boat at O. was not the measure of damages. The objection was overruled. *Held*, no error; that an answer giving the value at N. Y. would have been pertinent, and it did not appear but that such an answer was given; that, to raise the question, defendant should have asked the witness if he referred to the value at O., and, if he answered in the affirm-

ative, then should have moved to strike out his answer. (*Tiffany* agt. *Lord*, 65 N. Y., 310.)

TROVER.

See CONVERSION.

Lavery agt. *Snethan*, ante, 152.

TRUSTEE.

1. Where a mortgage was made without consideration, but was assigned by the mortgagee as a valid security to a bona fide purchaser for an amount less than its face, the purchaser relying upon the representations of the mortgagor and mortgagee that the mortgage had been issued for its full value,

Held, that the assignee, upon a sale by him of the mortgage for its face, was not a trustee for the mortgagor, nor his creditors, as to the difference between what he paid for the mortgage and the sum which he received upon its sale. (*Grisler* agt. *Powers*, ante, 194.)

2. *Schaffer* agt. *Rielly* (50 N. Y., 61), and *Freeman* agt. *Auld* (44 id., 50) distinguished. *Id.*

UNDERTAKING.

1. An order of reference, under section 322 of the Code, to ascertain damages upon an undertaking given upon the granting of an injunction, cannot be regularly granted until judgment has been entered; but where the order is entered by plaintiff's consent this obviates the objection. (*Lawton* agt. *Green*, 64 N. Y., 326.)

2. The limit of liability upon such an undertaking is the amount specified therein, and the court has no power to make any allowance beyond that amount for disbursements. Referee fees upon

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- the reference are part of the damages, and recoverable as such. (*Id.*)
3. Accordingly, *held*, that an allowance for disbursements and referees fees over and above the sum specified in the undertaking was error. (*Id.*)
 4. Such a proceeding is not a proceeding "in the action;" it is a proceeding after judgment, constituting no part of the action, and the court has no power to give costs therein. (*Id.*)
 5. The final order in such proceedings should be limited to fixing the amount of damages, and a provision therein requiring the plaintiff to pay the same is improper. The amount of damages so ascertained is conclusive upon the parties and the sureties, but payment can only be enforced by action upon the undertaking. (*Id.*)
 6. Where, upon appeal from justices' court, an undertaking is given as prescribed by section 356 of the code, the parties executing it covenant for the final result of the action, and if, ultimately, a final judgment is rendered against the appellant, upon which an execution may and is issued and returned unsatisfied, they are liable. (*Humerton* agt. *Hay*, 65 N. Y., 380.)
 7. According, *held*, where the appeal to the county court resulted in a judgment in favor of the respondent, which was reversed by the general term of the supreme court, and the cause certified into the supreme court and there tried, resulting in a judgment for respondent, upon which execution was issued and returned unsatisfied, that the surety on the undertaking, given on appeal to the county court, was liable. (*Id.*)
 8. An execution was issued upon the county court judgment, and levy made upon property sufficient to satisfy it. An undertaking was given upon appeal to the general term. *Held*, that the execution and levy did not aid defendant, as they fell with the reversal of the judgment; and that the undertaking in suit was not superseded by the one given on appeal to the general term. (*Id.*)
 9. As to whether it would have been superseded had the county court judgment been affirmed, *quære*. (*Id.*)
 10. No notice of judgment, execution and return is necessary to be given before suit is brought upon such an undertaking. (*Id.*)
 11. The return by the sheriff of the execution unsatisfied, is, in the absence of collusion or fraud, conclusive, and cannot be contradicted by evidence that the appellant had property out of which the execution might have been satisfied. (*Id.*)

UNDUE INFLUENCE.

See ASSIGNMENT.

Fowler agt. *Butterly*, ante, 471.

USURY.

1. Where a promissory note, signed and dated in New York and payable at a bank here, is negotiated for the first time in another state, the laws of the state where the note is negotiated are to control as to the defense of usury. (*Dickinson* agt. *Edwards*, ante, 40.)
2. The form of the note or obligation may be written here, but it only becomes a note or contract upon its delivery, and it is made when and where it is delivered. (*Id.*)
3. A. made his promissory note, dated in New York and payable at a bank here, and delivered the same to B., who took the note to

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the state of Massachusetts, where it was for the first time negotiated, C. discounting it at a rate of interest lawful there but more than allowed by the laws of this state. In an action by C. against A. on the note:

Held, that it was not void for usury, as the laws of Massachusetts must govern as to this question. (*Id.*)

4. Where a mortgage of \$20,000 was made to a third party to be sold, the plaintiffs purchasing said mortgage from an agent of the mortgagor and mortgagee, and paying for the same \$18,000, and afterwards receiving \$1,000 payment on the same; at the time of the assignment of the mortgage to plaintiffs, the mortgagor executed and delivered the usual mortgagor's certificate, upon the faith of which the plaintiffs took the assignment:

Held, that the plaintiffs having relied on the assurances of defendant, contained in the certificate, in taking the mortgage the defendant is estopped from setting up usury as a defense.

Held, also, that although said bond and mortgage, as to the original mortgagee, had no legal inception, yet in the hands of the plaintiffs it is a valid and subsisting lien, to the extent of the consideration advanced upon it. (*Real Estate Trust Co. agt. Rader et al.*, ante, 281.)

5. The plaintiffs having acquired a valid title to the mortgage, no subsequent usurious agreement to extend the time of payment could impair or avoid the original obligation. (*Id.*)
6. The acceptance by the lender from the broker of any portion of his commissions does not constitute usury. (*Wheaton agt. Voorhis et al.*, ante, 319.)
7. The representations of the agent of the lender do not bind the

principal unless authorized by him, or the fruits of such representations are received by the lender with knowledge of their origin. (*Id.*)

8. The question in such case would seem to be, did the lender receive the money from the broker for the purpose of evading the usury law, or for the purpose of receiving more than seven per cent for the loan of his money. (*Id.*)
9. Usury must be strictly proven as alleged, and any variance is fatal. (*Id.*)
- 10 Where the allegations in the answer are, that the plaintiff took \$2,900 in excess of legal interest for the loan or forbearance of the mortgage debt, while the evidence shows that the total amount received by the plaintiff was \$2,125: *Held*, to be a variance which is fatal. (*Id.*)
11. A motion at the close of the case to conform the pleadings to the proof can never be granted where the admission of the evidence has been promptly objected to upon the ground that the evidence did not tend to support the allegations in the answer. (*Id.*)

See MORTGAGE.

Gripler agt. Powers, ante, 192.

VARIANCE.

1. Usury must be strictly proven as alleged, and any variance is fatal. (*Wheaton agt. Voorhis et al.*, ante, 319.)
2. Where the allegations in the answer are, that the plaintiff took \$2,900 in excess of legal interest for the loan or forbearance of the mortgage debt, while the evidence shows that the total amount received by the plaintiff was \$2,125: *Held*, to be a variance which is fatal. (*Id.*)

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3. A motion at the close of the case to conform the pleadings to the proof can never be granted where the admission of the evidence has been promptly objected to upon the ground that the evidence did not tend to support the allegations in the answer. (*Id.*)
4. A variation between the complaint and the proof as to the details of a fraudulent conspiracy and the mode in which it is carried out, if the proof establishes such a conspiracy and an injury to plaintiff consequent upon the carrying out of the fraud, is not a failure of proof within the meaning of the code (sec. 171), and will not justify a dismissal of the complaint. Without proof "to the satisfaction of the court" that defendant has been misled, the variance to be deemed immaterial, and no amendment of the complaint is necessary. (*Place* agt. *Minster*, 65 N. Y., 89.)

VENUE.

1. When, upon a motion to change the place of trial, the defendant swears to nineteen witnesses residing in another county, all of whom are sworn to be material, and the plaintiff swears to no witnesses residing in the county where the venue is laid, but simply sets forth, in his affidavit, facts tending to show that the defense sought to be established by defendant's witnesses has no real existence, the motion should be granted. (*Wiggin* agt. *Phelps*, 10 Hun, 187.)

VERDICT.

1. The jury retired to consider their verdict, and after being absent for a long time returned into court and reported that they were unable to agree, and thereupon they were further instructed by the court, and in closing the instructions the

court stated to them as follows: "You must agree upon a verdict; I cannot discharge you until you agree upon a verdict." The jury retired and very soon returned into court and rendered their verdict of "no cause of action."

Held, that this verdict cannot be said to be the judgment of the jury acting without constraint and in the discharge of their obligations to render a true verdict according to the evidence, and, therefore, ought not to stand. (*Slater* agt. *Mead*, ante, 57.)

2. The proper mode of redress in such case is by motion to set aside the verdict. (*Id.*)
3. In an action to recover the possession of personal property, which has not been delivered to the plaintiff, the jury should assess the value of the property and damages for its detention, and not simply find a general verdict for damages, and the judgment in such a case should be for the recovery of the property, or the value thereof in case a delivery could not be had, together with damages for its detention. (*Phillips* agt. *Melville*, 10 Hun, 211.)

WAIVER.

See ANSWER.

Astie agt. *Leeming*, ante, 397.

Appearance of defendant in attachment suit in justices' court for the purpose of moving to set aside attachment for want of jurisdiction is not a waiver of the objection. (*See Tiffany* agt. *Lord*, 65 N. Y., 310.)

WILL.

1. A widow can maintain an action to obtain a construction of her husband's will. (*Keteltas* agt. *Keteltas*, ante, 65.)

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3. Where a testator gave to his wife \$5,000 to invest same and apply the income to the use and benefit of his son Leopold for life, and further directed that the *share of Leopold in the residuary estate* should also be paid to his wife, to receive the income thereof and apply the same to the use and benefit of said son L.:

Held, that the sum of \$5,000 did not pass under the residuary clause of the will, but that as to the same, after the death of Leopold, the testator died intestate.

Also *held*, that a bequest and devise to the testator's wife "*in lieu of dower*" did not exclude her participation in the personal estate, as to which he died intestate. (*Sink* agt. *Sink*, ante, 400.)

8. Where the testator, by the residuary clause of his will, gave the remainder of his estate to his wife and five children, share and share alike, but directed the share of his son Leopold to be paid over to the testator's wife, in trust, to apply the income to the use and benefit of Leopold for life:

Held, that upon the death of Leopold the portion of the estate designed for his support went to his heirs and next of kin. (*Id.*)

4. Where a testator gave the income of his estate to his four daughters, to be divided between them equally "during their, and each of their, natural lives, with remainder to their respective children, and to their respective heirs, it being further provided that if either daughter should die without issue, the share of such deceased daughter should be divided between the survivor or survivors of them, share and share alike, &c.:"

Held, that the testamentary disposition was void, as creating a limitation beyond two lives in being at the testator's death. (*Monarque* agt. *Rosqua*, ante, 488.)

5. The eighth clause of the testator's will is as follows: "After the

payment of my just debts and funeral charges I give and bequeath the rest and residue of my property, real and personal, of every kind and description, to my four children, Mary Wright Heartt, Charles S. Heartt, Jonas S. Heartt and Jane Lamberson, the wife of Edward Schell, to be equally divided between them, share and share alike." (*Heartt* agt. *Livingston*, ante, 487.)

6. The ninth clause declares: "In the event of any of my children dying, or either of them, before a division of my estate, leaving issue, then the share or shares to which he, she or they respectively would be entitled to under and by virtue of this will shall go to his, her or their issue respectively." (*Id.*)

7. By a codicil to the will the testator says: "Whereas I, Jonas C. Heartt, of the city of Troy, county of Rensselaer and state of New York, have made my last will and testament in writing executed the 10th day of February, in the year 1870, in which I have made certain devises and bequests to Charles S. Heartt; now, therefore, I do, by this writing, which I hereby declare to be a codicil to my said last will and testament, and to be taken as a part thereof, revoke and cancel the devises and bequests, and each and every of them embraced in my said will to the said Charles S. Heartt." (*Id.*)

8. The will bears date February 10, 1870, and the codicil thereto January 14, 1874. Charles S. died before the father, and on or about the 4th day of March, 1874, leaving one child the defendant Louise P. W. Livingston. The testator had at the time of making the will and codicil four children, to wit, Jonas S. (the plaintiff) and Mary W. and Jane L. (two of the defendants) and Charles S., aforesaid; and at the time of his death the said three children and Mrs.

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Livingston, the daughter of his deceased son Charles, were his only descendants:

Held, that, reading the codicil as a part of the will and as an amendment thereof, which both the law and the language thereof declare must be done, all devises and bequests to Charles are to be eliminated therefrom, the plain effect of which is to devise the residue of the estate to the remaining children, Jonas S., Mary W. and Jane L. (*Id.*)

9. When a testator has four children to provide for and gives to them the entire estate, share and share alike, and then by a codicil disinherits the one and revokes the devise as to him, the remaining three take the whole; and when a testator having but four children, by the residuary clause of the will gives such residue to the four equally, and then by codicil revokes the devise to the one, the other three take the whole. As amended by the codicil the will gives all to the three instead of the four. (*Id.*)

10. Although, as the will reads without the codicil, the proportion of each of the four named in the residuary clause would be one-quarter, yet this result is not expressed in words, and the question is not what was the original intention of the testator, but what did he intend when he made the codicil? That intention is to be gathered from the words of the will as it will read after an amendment which strikes out one name. So reading this will, as amended by the codicil, the devise is of all the residue to the three, as no words remain which limit the share of each one of the three to one-quarter of the whole. (*Id.*)

11. The ninth clause of the will makes no independent devise to Mrs. Livingston or any of the grandchildren. If the child would, if living, have taken nothing under the will,

then the issue can take nothing. By the will as amended by the codicil, Charles S. would have taken nothing; and as he could not, Mrs. Livingston cannot. (*Id.*)

12. In addition to the provision made for Mary W. by the residuary clause in the will, that instrument, in the first clause, declares: "I give and bequeath to my daughter Mary W. the use and occupation of the lot and dwelling-house in which I now reside, No. 67 First street, together with all the vacant ground connected thereto, being sixty-six feet eight inches of front on First street and 130 feet deep, together with all the out-buildings on the same; also all my household furniture, beds, bedding, silver plate, books, fixtures, as well as every other kind of personal property which may be on the premises of my residence at the time of my decease and belonging to me, except such articles as I may hereinafter dispose of." (*Id.*)

13. The next clause sets apart securities enough to produce an income annually of \$5,000 to be paid to the said Mary W. in monthly, quarterly or half-yearly payments, as she may elect, to keep up the establishment and pay taxes and insurance so long as she may occupy the premises given to her by the first clause. For how long a period of time she should have the use of the homestead the will does not provide, and the first clause in the will is the *only devise* to her of any *specific* real estate whatever. (*Id.*)

14. The codicil then provides: "I also hereby declare that the devise of real estate in my said will to my daughter Mary W. is a devise of the same to her for her natural life; and such devise to her for all real estate contained in my said will is to be construed and to have effect as a devise of the same to her for her natural life."

Held, that the devise of the

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homestead contained in the first clause of the will to Mary W. is limited, by the codicil, to her life.

Held, also, that as to Mary W. the residuary clause of the will is undisturbed by the codicil. (*Id.*)

WITNESS.

A surrogate acts judicially in conducting examination as to effects of deceased person under chapter 394 of 1870, and the testimony receivable on such examination is subject to the restrictions of section 399 of the Code. (*See Tilton agt. Ormsby*, 10 Hun, 7.)

What question calls for opinion of. (*See Murray agt. Deyo*, 10 Hun, 8.)

Change of venue for convenience of — motion for granted, when opposing affidavit simply sets forth facts tending to show that the facts sought to be established by defendant's witness have no existence. (*See Wiggins agt. Phelps*, 10 Hun, 187.)

Testimony of, as to general reputation — what questions may be asked. (*See Carpenter agt. Blake*, 10 Hun, 358.)

Statement by, of what was said to him by another witness before the trial — admissibility of. (*See Shear agt. Van Dyke*, 10 Hun, 528.)

Experts — Evidence of, in cases of insanity — what questions may be

asked. (*See Koenig agt. Globe Mut. Life Ins. Co.*, 10 Hun, 558.)

Examination of, on commission — answers to cross-interrogatories — by whom they may be read in evidence. (*See Marshall agt. Watertown Steam Engine Co.*, 10 Hun, 463.)

WRIT OF POSSESSION.

1. A writ of possession issued upon a judgment in ejectment can lawfully be executed after the return day thereof; the office of the writ is simply to carry into effect the judgment, and the command to return within sixty days is directory merely. (*Witbeck agt. Van Rensselaer*, 64 N. Y., 27.)

2. Although it is the duty of the sheriff, in executing such writ, if required to remove from the premises the personal property thereon, the omission to do so does not vitiate the execution of the writ when possession of the land is delivered. (*Id.*)

3. Where the action was brought by a landlord because of non-payment of rent and possession is delivered to him or his assignee, the statute giving to the defendant six months after such taking possession in which to redeem (2 R. S., 506, sec. 33) begins to run, and the time limited for redemption is not enlarged by a subsequent re-entry of the tenant. (*Id.*)

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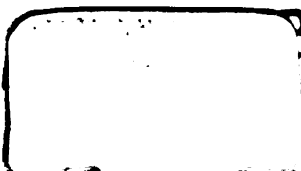
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